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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1930.

No. 555

GEORGIA PUBLIC SERVICE COMMISSION and JAMES A. PERRY, ALBERT J. WOODRUFF, WALTER R. McDONALD, CALVIN W. PARKER, and PERRY T. KNIGHT, as COMMISSIONERS THEREOF,

Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION,

Appellees.

CONSOLIDATED WITH

STATE HIGHWAY BOARD OF GEORGIA, et al.,

Appellants,

v.

UNITED STATES OF AMERICA, et al.,

Appellees.

BRIEF FOR GEORGIA PUBLIC SERVICE COMMISSION, APPELLANTS.

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No. 555

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BRIEF FOR GEORGIA PUBLIC SERVICE COMMISSION, APPELLANTS.

OPINIONS.

The opinion of the specially constituted District Court (Circuit Judge Bryan and District Judges Borah and Sibley), refusing an interlocutory injunction, is reported

as *Georgia Public Service Commission, et al.* v. *United States, et al.*, 39 Fed. (2d) 167. The final opinion of the same court, holding valid the order of the Interstate Commerce Commission, and dismissing the bills, is reported under the same title, 42 Fed. (2d) 467.

The Commission's reports entering the orders herein sought to be set aside appear as *Rates on Chert, Clay, Sand, and Gravel within State of Georgia*, 122 I. C. C. 133 and 160 I. C. C. 309. (R. 12 and R. 88.)

JURISDICTION.

The suits here consolidated were commenced on February 20, 1930, under the Urgent Deficiency Act of October 22, 1913, (c. 32, 38 Stat. 219; U. S. Code, Title 28, Sec. 46), to annul and set aside certain orders of the Interstate Commerce Commission, dated January 21, 1927, and December 9, 1929.

The final decree of the District Court declining to set aside, annul or suspend the order of the Commission and dismissing the bills was entered June 25, 1930, by a court of three judges convened in accordance with the provisions of Sec. 47 of said Title 28, U. S. Code. (R. 172.) The appeal was allowed August 23, 1930. (R. 180.)

QUESTIONS.

The ultimate question in the case is whether the orders of the Interstate Commerce Commission here assailed are a valid and lawful exercise of the power and authority vested in the Commission, under the Interstate Commerce Act and the Federal Constitution, to set aside intrastate railroad freight rates theretofore fixed by authority of the State of Georgia.

Subordinate questions are involved, as follows:

(a) Whether the Commission made the essential findings, that the intrastate rates in question were unlawful, to support the order herein attacked;

(b) Whether the essential findings and conclusions were supported by substantial evidence in the record;

(c) Whether the Commission committed various errors of law in making and entering the order complained of; and

(d) Whether the decisions of the District Court are erroneous in upholding the Commission's reports and orders and dismissing the bills of complaint.

The foregoing questions are presented under numerous specific assignments of error which will be discused hereafter.

STATUTES.

The only statutes involved in this case, save the procedural laws governing the filing of the suit and the appeal, are the Interstate Commerce Act and Acts amendatory thereof. The material sections thereof are printed as Appendix I to this brief.

STATEMENT OF THE CASE.

(a) Allegations of the Bills of Complaint.

On February 20, 1930, the appellants, Georgia Public Service Commission, and its individual members, filed their bill of complaint in No. 563 below, (R. 1), to enjoin the orders entered January 21, 1927, and December 9, 1929, by the Commission, which orders, in substance, required the substitution on intrastate traffic within the State of Georgia of the same scheme or basis of rates which the Commission had specified as maximum for interstate application, in place of the basis of rates then in force within the State by virtue of orders of the Georgia Public Service Commission.

The appellants, State Highway Board of Georgia, *et al.*, filed contemporaneously their bill in No. 656 below, in which the averments are substantially the same and the same relief is sought. (R. 148.) The two bills were consolidated by the court for hearing and final disposition. (R. 159.)

Grounds of Error Stated in Bill.

The bill of complaint in No. 563 sets forth 11 grounds of error in the Commission's action, (R. 8), upon which the District Court was asked to permanently enjoin and set aside the Commission's orders. They are the foundation for the principal assignments of error in the appeal to this court and are as follows:

(a) Aforesaid reports and orders constitute an unlawful invasion of the sovereign rights of the State of Georgia reserved to it by the Constitution of the United

States, and of the citizens of the said State of Georgia, and are without warrant or authority under the Constitution of the United States.

(b) Aforesaid reports and orders constitute an unlawful exercise of power by said Interstate Commerce Commission, without warrant or authority under the Constitution of the United States or the Interstate Commerce Act, as amended.

(c) Aforesaid reports and orders are arbitrary and unlawful in that in substance they purport and seek to restrain and enjoin the Georgia Public Service Commission from requiring the railroads to charge, for intrastate transportation of sand, gravel, stone, etc., within the State of Georgia, rates which are the same in amount for corresponding distances of actual transportation, or on the same basis, as interstate rates which the aforesaid carriers are permitted by said Interstate Commerce Commission to continue charging for interstate transportation into and out of said State of Georgia and in territory contiguous thereto.

(d) Aforesaid reports and orders are arbitrary and unlawful in that they purport to and do impose a formula to govern rates for transportation of said materials within the State of Georgia, not in harmony with a lawful order heretofore entered by the Georgia Public Service Commission prescribing maximum rates for said intrastate transportation; and said Interstate Commerce Commission has no power conferred on it by law to prescribe a rate-making formula, as such, its authority being limited to prescribing reasonable rates, as maximum rates or as minimum rates.

(e) Aforesaid reports and orders are arbitrary and unlawful in that they prescribe rates for actual services of transportation over actual routes of movement in in-

trastate commerce within the State of Georgia and also in interstate commerce, to be made with regard to fictitious mileages, that is to say, with regard to the distances over routes that are not used and which neither the Interstate Commerce Commission nor the Georgia Public Service Commission could require the carriers to operate as through routes for the transportation of property without infringement of the constitutional rights of said carriers and of their rights under paragraph (4) of Section 15 of the Interstate Commerce Act.

(f) The aforesaid reports and orders are erroneous in law and the Commission was without jurisdiction to enter them in so far as they purport to fix rates for the intrastate transportation aforesaid, because under the Commission's order instituting the aforesaid inquiry in No. 17517, under the allegations of the complaint in the aforesaid case No. 17763, and under the aforesaid order of June 4, 1928, reopening the said proceedings for further hearing and investigation, the issues were limited so that the Commission did not have jurisdiction to enter a valid order under the terms of Section 13, or of any other section of the Interstate Commerce Act.

(g) Aforesaid reports and orders are erroneous and invalid because the record of evidence on which they were entered does not show the transportation conditions, or the circumstances and conditions under which aforesaid materials actually are transported for the respective intrastate movements within the State of Georgia and interstate movements into and out of said state, and therefore the record affords no basis for determining the similarity or dissimilarity of the actual services under said intrastate rates, on the one hand, and under the interstate rates, on the other hand.

(h) The report and order are erroneous because there

is no substantial evidence of record in the proceedings wherein they are entered warranting or requiring a finding that the rates for the transportation of the materials in question now charged, or which are made or imposed by authority of the State of Georgia, or any of said rates, for said intrastate transportation, cause any undue or unreasonable advantage, preference or prejudice, as between persons or localities in intrastate commerce in the State of Georgia, on the one hand, and interstate of foreign commerce, on the other hand, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce, or any burden upon interstate or foreign commerce; and in fact, the aforesaid intrastate rates are not preferential, or prejudicial, or discriminatory, or burdensome.

(i) The aforesaid reports and orders are erroneous and invalid because the Interstate Commerce Commission therein undertakes to require reductions in intrastate rates within the State of Georgia, which are wholly beyond the jurisdiction of said Commission to reduce; and because the rates therein required tend to create and will create unjust discriminations and undue preferences as among different and competing shippers and producers of said materials in Georgia, in violation of the statutes of said state governing such intrastate transportation.

(j) The aforesaid reports and orders are erroneous and invalid because they are not supported by evidence and they are contrary to the manifest weight of the evidence in these proceedings.

(k) Aforesaid reports and orders are unlawful and invalid for other and manifest errors of law and of fact.

The United States of America and the Interstate Commerce Commission, as defendants, joined issue on the

material averments of the bills, admitting only certain of the recitals of fact which are self-evidently beyond controversy. (R. 133, 135.) Intervening petitions and answers in harmony with those of the defendants were presented on behalf of certain railroad companies which were respondents in the proceedings before the Commission. (R. 138, 143.)

(b) The proceedings before the Commission.

These cases originated in a petition filed by the Atlantic Coast Line and eight short line carriers operating in the State of Georgia, upon which the Commission instituted its proceeding of inquiry under its docket No. 17517, by an order of investigation dated October 5, 1925. The petition of these railroads was directed against an order which had been entered by the Georgia Commission on February 25, 1925, prescribing maximum carload rates on these commodities and the carriers sought relief under Sections 3 and 13 of the Interstate Commerce Act. (R. 188.) The Commission's order of inquiry made all the railroads operating within the State of Georgia respondents and notice was served upon the state authorities as contemplated by Section 13. (R. 204.)

There were consolidated with No. 17517, for hearing and decision, a number of formal complaint cases, some of which involved issues foreign to the present inquiry. No. 17763 was the only one of the group directed against the rates in Georgia, and it contained a so-called Section 3 averment with respect to the interstate rates from Montgomery, Alabama, and Chattanooga, Tennessee, which were averred to be prejudicial as compared with intrastate rates in Georgia. (R. 186.)

After protracted hearings the Commission entered its

original report and order of January 21, 1927, 122 I. C. C. 133. (R. 12.) The Commission therein prescribed certain bases of rates on these commodities as maximum for interstate application within the southeast, to a limited and defined extent. It was suggested that there should be no different rate level interstate as against intrastate rates in that territory. The Commission found that the record then made would not sustain a finding of unjust discrimination against interstate commerce in the Georgia rates theretofore in effect. (R. 59.) It expressed the expectation that the Georgia Commission would co-operate in authorizing such revisions as might be necessary to bring the rates in that state into harmony with the interstate adjustment therein approved, which adjustment was a maximum basis of interstate mileage scales. (R. 59.)

Thereafter, the Georgia Commission had public hearings which resulted in the issuance by it of an order dated March 13, 1928. (R. 76.) This order prescribed a new basis of rates on these commodities within the State of Georgia, in the form of mileage scales to govern all movements, single-line as well as joint-line, throughout the state, one scale governing movements over standard lines, another scale governing transportation over so-called weak lines. These scales differed in certain respects from the interstate maximum scales prescribed by the Interstate Commerce Commission in its order of January 21, 1927.

The principal carriers operating within the State of Georgia thereupon presented their petition to the Commission, complaining in effect that the rates required to be maintained by the order of the Georgia Commission caused undue preference to state shippers and state traffic and unjust prejudice against interstate shippers

and interstate traffic. (R. 211.) The Commission thereupon entered its order of June 4, 1928, and reopened the cases on the sole question of alleged violation of the substantive provisions of Section 13, as to an unlawful preference of state and undue discrimination against interstate traffic. (R. 240.)

After further hearings in November, 1928, which were limited to the question of unjust discrimination, briefs were filed and oral argument had and the Commission entered its further report and order of December 9, 1929, 160 I. C. C. 309. (R. 88.) Petition for rehearing was filed by the Georgia Commission under date of January 11, 1929. (R. 118). This petition was summarily denied (R. 249); the carriers filed their new schedules of rates in ostensible compliance with the Commission's reports and orders; and the Georgia Public Service Commission filed this bill.

(c) The major essentials of the Findings of the Commission.

The two reports and orders of the Commission which are the occasion of this proceeding may be summarized as to their major essentials:

(a) In its original report and order of January 21, 1927, the Commission prescribed only maximum rates, as reasonable for interstate transportation of sand, gravel, etc., in Georgia territory.* No minimum rates or intrastate rates were prescribed. The maximum rates so prescribed were higher in a great many cases than the carriers theretofore had voluntarily maintained for interstate transportation. They were lower in many instances than the carriers had proposed.

*The report did not prescribe rates generally throughout the southeastern states.

(b) The maximum rates so prescribed were in the form of mileage scales, which purported to recognize a difference between single line hauls and joint line hauls, that is to say, between transportation performed over one railroad and transportation performed over two or more railroads.

(c) The formula which the Commission prescribed for the application of these mileage scales, provided that they were to be applied against the mileage over the shortest rail routes between point of origin and destination by which carload freight could move without transfer of lading. The mileage over the actual routes of transportation was not necessarily considered.

(d) The decision contemplated that longer lines would publish the same rates as shorter lines between the same points; and this is the invariable practice in the interstate schedules filed under the order, except in cases of very unusual circuity.

(e) The aforesaid decision further provided a higher basis of maximum rates where the transportation is performed, wholly or in part, over certain so-called short lines or weak lines, which were named in an appendix to the report.

(f) The decision also found that the intrastate rates for transportation within the State of Georgia had been prescribed by the Georgia Commission in an order dated February 25, 1925, and that considering the results brought about by said order, it could not be found on the record to have brought about a situation unjustly discriminatory against interstate commerce. (122 I. C. C. 169.)

(g) The subsequent report and order of the Interstate Commerce Commission dated December 9, 1929 (160 I. C. C. 309), found in very general terms that the

state rates in Georgia were in violation of Sec. 13 of the Interstate Commerce Act in that they were unduly preferential to state shippers and state commerce and unduly prejudicial to interstate shippers and interstate commerce, insofar as they were lower, distance considered, than the interstate rates. These findings were general, dealing with the adjustment as a whole, and not specific as to any particular rates. A great many of the rates in Georgia were recognized by the report as being in entire harmony with the interstate rates.

(h) The aforesaid decision of December 9, 1929, required the removal of the condemned discrimination and the establishment by the respondent railroads of rates for intrastate transportation within the State of Georgia, (a) not lower, distance considered, than those contemporaneously applied on interstate traffic; and (b) not exceeding the scales of rates set forth in the appendix to the order, namely, the scales which had been prescribed as maximum for interstate application in the previous order of January 21, 1927. No element except distance is specified in the findings.

(i) The said decision of December 9, 1929, did not amend the previous decision as to the rates prescribed as maximum for interstate transportation. It simply provided both a maximum basis and a minimum basis of rates for intrastate application in Georgia and in substance set aside the decision of the Georgia Commission entered March 15, 1928. As we shall show in detail in the argument, this minimum basis is vague, indefinite and uncertain.

DEFICIENCIES IN RECORD BEFORE COMMISSION.

As to the proceedings had before the Commission and the record of evidence upon which the orders in question were entered, we respectfully invite the court's attention to these features:

(a) The order of investigation under which the Commission conducted its inquiry which resulted in the report of December 9, 1929, was limited to the question of undue prejudice and unjust preference and did not involve the reasonableness of the rates for interstate or intrastate transportation. (R. 204).

(b) In the investigation that preceded the order dated December 9, 1929, which purports to nullify the Georgia Commission's order, the Interstate Commerce Commission refused to receive competent evidence tending to show what would be just and reasonable rates for the intrastate and interstate transportation aforesaid for the future.

(c) While the burden of proof was upon the respondent carriers under Section 15 of the Act to justify the reasonableness of rates proposed to be advanced in these proceedings, such evidence was not offered or received and such burden was not met by respondents in the record.

(d) The record upon which the aforesaid orders were entered contains no evidence showing or tending to show that transportation over joint line routes is more difficult or expensive than over single line routes of corresponding distances.

(e) The aforesaid record contains no evidence whatsoever of the transportation condifions respecting the intrastate transportation of these materials in Georgia to which the intrastate rates fixed by the Georgia Commis-

sion and those prescribed by the Interstate Commerce Commission's order are applicable.

Commission's Record Presented to Court.

The evidence presented in support of the bill of complaint is the record made before the Commission, consisting of the essential pleadings, interlocutory as well as final reports and orders, the transcript of the testimony and the exhibits. It is stipulated by all counsel (R. 183) that the narrative of testimony, as now contained in the printed record, is a true and correct transcript of all of the oral testimony before the Commission which is relevant to the subject-matter of this appeal. It was further stipulated (R. 183 and R. 815), that the copies filed with the District Court of the original exhibits which had been considered by the Commission need not be printed but that either side, or any party by counsel, or the court, or any member thereof, may refer to such documents with the same force and effect as if the same had been printed in full in the record.

In addition to the record before the Commission, the District Court received in evidence copies of the schedules in which the interstate rates in force as of the date of the Commission's decision were published and filed with the Interstate Commerce Commission, as required by Section 6 of the Interstate Commerce Act, together with a copy of the new schedule filed with that Commission, wherein the carriers simply published the Commission's maximum mileage scale to govern intrastate movements in Georgia, effective March 3, 1930. These schedules may also be considered by the court and counsel, being expressly covered by the foregoing stipulation. (R. 183, R. 815.)

ASSIGNMENT OF ERRORS RELIED UPON.

The following assignments of error are relied upon by appellants, Georgia Public Service Commission *et al.* (R. 174, 175, 176, 177, 178, 179):

The court erred:

1. In not enjoining the aforesaid order of the Interstate Commerce Commission here under attack, because the said order exceeds the powers which the said Commission constitutionally could exercise, and constitutes a regulation of and interference with intrastate commerce, not shown to affect or to be burdensome upon commerce among the states.

2. In not enjoining the aforesaid order on the ground that it was entered in violation of the fifth amendment to the Constitution of the United States, the due process clause, in the following particulars:

(a) The issues were limited under the Commission's orders instituting and reopening the inquiry so as to exclude the question of the reasonableness of the rates for the future for intrastate transportation in Georgia and for interstate transportation.

(b) While the Interstate Commerce Act puts the burden of proof on the carriers in any proceeding involving railroad freight rates proposed to be advanced, the said Commission did not require the carriers to assume such burden and refused to receive any evidence as to the reasonableness of the proposed increased rates which it afterwards prescribed as minimum rates for intrastate transportation in Georgia.

(c) There was not a full hearing and due investigation by the said Commission.

3. In not enjoining the aforesaid order on the ground that the order was beyond the statutory power of said Commission, in the following respects:

(a) The said order requires numerous reductions in rates for intrastate transportation in Georgia, contrary to the limitation in paragraph (2)(a), of Section 1 of the aforesaid Act.

(b) The said order creates numerous violations of the so-called long and short haul clause in paragraph (1) of Section 4 of said Act.

(c) Only discriminations which are unjust and preferences and prejudices which are undue or unreasonable are forbidden and made unlawful by paragraph (1) of Section 3 and by paragraph (4) of Section 13 of the Act. There was no substantial evidence of similarity of transportation conditions and identity of carriers, in connection with the state and interstate rates to sustain findings of undue preference and unjust discrimination, which said Commission is empowered to remove.

(d) The aforesaid order seeks to impose a rate formula on intrastate commerce in Georgia, and no power has been conferred on said Commission to prescribe rate-making formulas, *as such;* its authority under Sections 15 and 13 of said Act is limited to prescribing reasonable and non-prejudicial rates, as maximum rates or as minimum rates, or both, for transportation services.

(e) The said Commission has power to prescribe intrastate rates only upon certain and specific findings under Section 13 of the Act; its findings in the aforesaid order are broad and sweeping; and there was no evidence of any violation of said Act in respect of the larger number of intrastate rates in Georgia.

4. In not enjoining the aforesaid order on the ground that said Commission in entering said order acted arbi-

trarily and unjustly and prescribed rates for transportation wholly within the State of Georgia contrary to the evidence and without substantial evidence to support its action, in particulars as follows:

(a) The aforesaid order in effect restrains the Georgia Public Service Commission from requiring the carriers to charge, for intrastate transportation within the State of Georgia, rates which are the same in amount for corresponding distances of actual transportation, as interstate rates which the same carriers are permitted by the Interstate Commerce Commission to continue charging for interstate transportation.

(b) The aforesaid order purports to rest on the principle that the rates ought to be higher for so-called joint line movements, over the lines of two or more carriers, than for corresponding distances over the individual line of a single carrier; there was no evidence before the Commission tending to support such principle or to show that transportation of the commodities here involved, sand, gravel, chert, etc., over joint lines is necessarily more expensive than over single line routes; and as to numerous other commodities, such as cement, brick, sugar and fertilizer, the Commission has prescribed scales of carload rates which are identical for single line and joint line movements.

(c) The aforesaid order makes distance the sole element for declaring discrimination against interstate commerce and for fixing and determining the rates to be charged within the State of Georgia and the order is arbitrary in that it ignores all other relevant facts.

(d) The aforesaid order prescribes minimum and maximum rates for actual services of transportation over actual routes of movement in intrastate commerce in Georgia, and the Commission prescribes only maximum

rates for interstate transportation, the latter to be made, however, with regard to fictitious mileages, that is to say, with regard to distances over supposed routes that are not used and over which the carriers could not be required to operate as through routes under the limitation in paragraph (4) of Section 15 of the Interstate Commerce Act and of the Fifth Amendment to the Constitution.

(e) The aforesaid order is arbitrary because it was entered on a record which does not show the transportation conditions, or the circumstances and conditions under which the materials in question actually are transported for the respective intrastate movements within Georgia and interstate movements into and out of said state; and therefore the record affords no basis for determining the similarity or dissimilarity of the actual services under said intrastate rates and interstate rates respectively.

(f) The aforesaid order creates and requires violations of the so-called long and short haul principle expressed in paragraph (1) of Section 4 of the Act.

(g) The aforesaid order requires so-called short or weak lines of railroad, against their desire and without evidence of any violation by them of Sections 3 or 13 of the Act, to increase their intrastate rates substantially above the rates of the standard lines and is therefore arbitrary.

5. In not enjoining the aforesaid order on the ground that the said Commission in entering said order had in the record before it no substantial evidence to support the essential findings necessary to the entry of a valid order under the provisions of the said Act.

SUMMARY OF ARGUMENT.

The appellants concede that if the final report and order of the Commission contains findings of real and substantial discrimination created by low rates on sand, gravel, stone, etc., within Georgia, to the undue prejudice of interstate commerce, or findings that the state rate basis is lower than the interstate and is unduly burdensome on interstate commerce, such report and order should be approved and enforced by the courts, *provided* there was substantial evidence to support such findings.

The appellants contend, however, that there was no substantial evidence presented to the Commission of actual unjust discrimination against interstate commerce, in respect of the measure of the rates generally charged for actual services of transportation, intrastate versus interstate, and there was no evidence of a substantial burden on interstate commerce from the state rates on these materials in Georgia.

The appellants further contend that the findings of the Commission amount to a sweeping wholesale condemnation of state rates, or rather the formula on which the state rates in Georgia were constructed, and a blanket requirement to substitute the formula worked out by the Interstate Commerce Commission, for the basis theretofore ordered by the State Commission. The order required reductions in numerous state rates, advances in numerous others, and no changes in a great many of the state rates, without any clear definition of why certain rates should be required to be advanced and certain others remain unchanged. Manifestly the Commission had no constitutional power to order any reductions in state rates.

In other words, this case does not present a situation in any respect similar to that in the leading *Shreveport Case* (*Houston, East and West Texas Ry. Co.* v. *United States*, 234 U. S. 342), or in other cases in which this court has upheld the action of the Interstate Commerce Commission in setting aside state rate schedules which were in conflict with the interstate rate structure.

It will be remembered that in the *Shreveport Case*, the Texas Commission had endeavored to build a rate wall around the State of Texas and a notoriously low level of rates was made by that Commission, for the avowed purpose of favoring its commerce against the interstate traffic. But in the present case, the whole history of the action and attitude of the Georgia Commission has been in the direction of building up the revenues of these interstate carriers on these materials, advancing cut-throat competitive rates which various carriers had maintained, one competing against another, and to put the rate schedules on a fairly harmonious general basis. The order of the Georgia Commission fixing the maximum rates on these materials within Georgia, entered March 13, 1928, and against which the Commission's order is directed, was in complete harmony *in principle* with the repeated decisions of the Interstate Commerce Commission, in the treatment of rates for so-called joint-line hauls as distinguished from single-line movements.

The Interstate Commerce Commission issued its final order, in substance setting aside the Georgia Commission basis, arbitrarily and capriciously and without good grounds for that action, although the carriers were freely discounting the full measure of the interstate scale wherever one carrier competes against another.

The interstate rate structure on these materials is controlled by *maximum* scales of rates fixed by the Com-

mission. One characteristic is, that between any given points of origin and destination *either* the shortest single line of railway, *or*, the shortest route or theoretical route composed of parts of two or more railways over which carload traffic *may* move without transfer of lading, may be the *rate-making route*. The prescribed scales are applied to the distances over such routes, whether or not any traffic moves over them. Thereupon, all routes which participate in traffic between those points maintain the same rates, ascertained by applying the proper one of the Commission's scales to the mileage over the so-called rate-making route.

It is therefore a further feature of the interstate rate structure that the average level of the interstate rates is substantially below the Commission's scale rates applied against the actual distances of interstate transportation since the shortest possible routes are used to determine the going rate under the scale and then that rate is applied over all routes.

The outstanding characteristic of the Commission's plan of rates on these materials, both state and interstate, is a recognition or pretended recognition of a difference between joint-line and single-line movements, with a higher rate basis for the former than the latter. We say pretended recognition, because the principle commonly gives way and is generally expected to do so in the meeting over any route of the rate made by another route between the same points, whether the one be single-line and the other joint-line, or vice versa, or whether both be of the same nature, *i. e.*, single or joint line. But the principle supposed to control and which distinguishes the Commission basis on sand and gravel, is the higher joint-line scale than single-line scale. This characteristic is absent from the Commission's rate bases which it pre-

scribed in other cases for class rates and for commodity rates on cement, brick, fertilizer, sugar, etc.

We ask the court to observe that the findings of the Commission could not have been broader and more comprehensive than they were drawn, and while failing to condemn all of the state rates, they also fail to specify the circumstances which shall determine whether given state rates are preferential, or to specify the degree of such preference and with reasonable definiteness the manner in which it shall be removed. It must be borne in mind that ever so many of the state rates have not been changed by the carriers in their schedules ostensibly complying with the Commission's decision here under attack; and the changes made in other rates has been by applying the full maximum scale rates specified in the Commission's order with no discount therefrom, save where a competing line between a given point of origin and destination meets the rate of another line between the same points, the latter not necessarily being the shorter line, but simply one which would take a lower rate under the Federal Commission's formula.

The Commission's final order pretends to find an unjust discrimination against interstate commerce, yet many of the rates in Georgia which have been raised could not possibly have been held to infringe against any interstate rates.

The Commission's order pretends to prescribe a minimum basis for intrastate rates in Georgia, yet this basis is vague, indefinite and uncertain and is clearly higher than the interstate rates actually charged for the same distances.

The Commission's order pretends to deal with an impairment of the revenues of the carriers. But there was no real showing that the substitution of the Commission's basis, in lieu of the state rates heretofore in effect, will increase the revenues of the carriers on state traffic; and

there is no showing that there is not a much greater impairment of the aggregate railroad revenues through the charging on interstate shipments of rates much lower than the Commission's scale would make for the actual distances of transportation.

The Commission's final report and order dealing with the intrastate rates in Georgia would not be valid and enforceable if the transportation to which they applied were in point of fact strictly interstate and therefore within the primary jurisdiction of the Commission. By this we mean to say, that the Commission's authority over interstate transportation, under the terms of the Act, is limited to prescribing rates for the future where existing rates are expressly found to be, unjust and unreasonable in violation of Section 1, unduly discriminatory in violation of Section 2, or unjustly prejudicial or unduly preferential in violation of Section 3, or greater for longer than for shorter distances in violation of Section 4. Unjust discrimination, undue prejudice and unjust preference are established only where certain elements are found to be present, namely, the discrimination must flow from a common source, the circumstances and conditions must be substantially similar and these and other essential facts are required to be established by testimony in a hearing after formal complaint. If we assume that all state lines were wiped out, many of the rates within Georgia which have been advanced under the Commission's final order on the theory that they are in conflict with the interstate rate structure, have not been shown by any evidence before the Commission to apply under similar circumstances and conditions or over the lines of the same carriers as any other interstate rates, higher for comparable distances.

As to the numerous rates within Georgia reduced by the Commission's order, there was no evidence that for

the service of transportation performed thereunder these rates were unjust and unreasonable.

For these reasons, and in this sense we say that the Commission's order herein attacked would not be enforceable against carriers not willing to comply therewith, if all of the transportation governed thereby were strictly interstate and no constitutional question of federal authority over state commerce were involved.

The Commission's disposition of these proceedings conflicts in principle with its decisions in other cases involving rates within the southeastern territory. The decision herein purports to find that transportation over joint-line routes is more expensive than over single-line routes, simply because the routes are joint-line, although it freely recognizes and permits joint-line routes to compete with single-line routes for traffic under equal rates. On the other hand with respect to the entire underlying class rate structure and the commodity rates on cement, brick, fertilizer, sugar, petroleum, etc., etc., the Commission has made no such distinction and has required a common scale on which to govern alike joint-line and single-line movements, recognizing the desirability of having all routes, not unduly circuitous, competing for traffic.

The appellants contend that the District Court erred in not granting the relief prayed for in the bill, in not setting aside the Commission's order, which was invalid for all of the reasons herein suggested, and in not enjoining the schedules which the carriers have made effective on state traffic in Georgia. These schedules are contrary to the state statutes and the State Commision's orders thereunder and exceed any requirements of the Commission's assailed order, however that order might be construed.

ARGUMENT.

I.

The Commission's reports and orders are void because they are an unlawful invasion of the sovereign rights of the State of Georgia in the regulation of intrastate commerce.

The regulation of rates for railroad transportation within the State of Georgia as within any other state is primarily vested in the state Commission. The power of the Federal government as exercised by the Interstate Commerce Commission is secondary with respect to such state rates and extends only to the correction of an undue preference to state shippers or state commerce or an undue burden on interstate commerce. Nor has the Federal Commission any authority, either primary or secondary, to deal (a) with excessive charges for transportation within a state, or (b) with purely intrastate discriminations and preferences, where one state shipper or locality may be prejudiced and another state shipper or locality unduly preferred by a maladjustment purely within the state.

The Commission has no general authority to regulate intrastate rates and the mere existence of a disparity between particular rates on intrastate and on interstate traffic does not warrant the Commission in prescribing intrastate rates.

Arkansas Railroad Commission v. *C., R. I. & P. Ry. Co.*, 274 U. S. 597.

State of Florida v. *United States*, decided January 5, 1931. Adv. Sheets, Oct. Term, 1930, No. 5, page 212.

An order of the Interstate Commerce Commission should not be given precedence over a state statute or the requirement of a state Commission in regulating state rates, unless and except insofar as said order conforms to a high standard of certainty.

Railroad Commission of Wisconsin v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 580; 66 L. Ed. 371.

Illinois Central R. R. Co. v. *Public Utilities Commission of Illinois*, 245 U. S. 493, 510; 62 L. Ed. 425.

American Express Company v. *South Dakota*, 244 U. S. 617, 625; 61 L. Ed. 1352, 1358.

Arkansas Railroad Commission v. *Chicago, Rock Island & Pacific R. R. Co.*, 274 U. S. 597, 603; 71 L. Ed. 1224, 1228.

The Minnesota Rate Cases, Simpson v. *Shepard*, 230 U. S. 352; 57 L. Ed. 1511.

The Shreveport Case, Houston, East and West Texas Ry. Co. v. *United States*, 234 U. S. 342; 58 L. Ed. 1341.

The Commission's order definitely and intentionally requires reductions in numerous state rates in Georgia and changes inter-relationship of many purely state rates.

In the exercise of the functions vested in it by the statutes and under the constitution of the state, the Georgia Commission entered its order of March 13, 1928 (R. 76), in which it prescribed certain rates as reasonable maximum rates for the intrastate transportation of sand and gravel in Georgia and for the purpose of removing purely intrastate discriminations, namely, preferences to certain traffic and certain shippers within the state and prejudice against certain other traffic and shippers within the state. The Georgia Commission announced that under the conditions developed in the record before it and covered by its findings, the rates for

joint-line hauls should not be higher, simply because the hauls were joint-line, than the rates for single-line hauls of the same distance, and that the maintenance of higher joint-line than single-line rates created preferences and discriminations within the state. (R. 79-80.)

The Interstate Commerce Commission's reports and orders here under question were intended to set aside and to nullify the order of the Georgia Commission and resulted in the re-creation of discriminations as among Georgia shippers which that Commission had condemned and ordered removed, and with which the Federal Commission has no jurisdiction to deal.

This was sought to be accomplished by the terms of the order of the Commission, which has been interpreted by the carriers as requiring higher rates for joint-line hauls than for single-line hauls of equal mileage, over so-called *rate-making routes.*

At the same time, the railroads as engaged in interstate transportation are allowed to continue joint-line rates over actual joint-line routes of movement which are the same as the rates for single-line movements between points over other roads, and which, distance considered, are therefore *lower than the interstate single-line basis.*

In other words, the Commission's order ties the hands of the Georgia Commission in requiring certain rates to be applied on intrastate transportation in Georgia and at the same time permits the carriers voluntarily to charge that same measure of rates for the same distance of interstate transportation which the Georgia Commission cannot enforce in Georgia.

An illustration of how the Commission order works out is afforded by taking Geneva, Georgia, as an assumed destination for a road-building project and the competitive materials of washed gravel from Montgomery, Ala-

bama, or crushed stone from Sparta, Georgia, the former an interstate, the latter an intrastate movement. This situation is pictured on the first of a series of charts, in Appendix 3 to this brief.

In this and subsequent illustrations we have taken points of origin and destinations shown in exhibits of record before the Commission, the distances and rates all appearing in the exhibits and the routes are depicted on maps in evidence, particularly Map Exhibit 161-B. (R. 732.)

Geneva is a local point on the Central of Georgia Railroad between Fort Valley and Columbus, Georgia. It is 125 miles by that line from Montgomery. It is also 125 miles from Sparta, Georgia, via Georgia Railroad to Macon, Central of Georgia beyond. The Georgia Commission's scale makes $1.10, the same as from Montgomery under the interstate single-line scale for the same distance. (R. 732, 117.)

The interstate order has resulted in raising the Sparta rate to Geneva to $1.25, because that is the joint-line scale for that distance. But if there happened to be a joint-line route from Montgomery to Geneva of 125 miles or more, the Commission would permit the carriers over that route to charge $1.10, the same as the single-line rate. (R. 108-9.) As a matter of fact, we can point out any number of 125-mile actual joint-line hauls interstate for which $1.10 or less is charged.

This illustration would not be complete if we did not point out that both of the carriers involved in this intrastate movement, (the Georgia Railroad and the Central of Georgia), freely participate in many interstate rates where they have discounted the full measure of the Commission's maximum interstate scale, as applied to the actual distance of transportation. For example, from

Chattanooga to Athens, the Georgia Railroad joins with the Nashville, Chattanooga & St. Louis in a through route of 272 miles for which it is only charging a rate of 150 cents on sand and gravel, although the Commission's joint-line scale rate for that distance is 170 cents. They have discounted the scale rate 20 cents per ton, because the Southern Railway has a single-line route, only a few miles shorter, from Chattanooga to Athens, for which the scale rate is 150 cents for the distance of 272 miles. The Central of Georgia likewise is participating in many interstate rates which are substantially lower than the Commission's scale would make when applied to the distance over its rails, such as the rate from Montgomery to Waycross, where the Central of Georgia, Southern and Atlantic Coast Line form a route of 382 miles over which the rate is 165 cents, although the Commission's maximum scale would make 190 cents.* If the Georgia Railroad can discount the scale 20 cents for movements over its line from Chattanooga to Athens, and if the Central of Georgia can similarly discount the scale rate 25 cents from Montgomery to Waycross, we fail to see any compelling reason why the State of Georgia cannot require a rate for movements from Geneva to Sparta, which happens to be 15 cents less than the maximum interstate scale for that distance and which is necessary in the opinion of that Commission in order that the producer at Sparta may compete for business at Geneva with producers located at other points in Georgia, and which that Commission further regards as affording the carriers sufficient revenue for the service performed.

For a companion illustration, we invite attention to the second chart printed in Appendix 3, which covers the interstate routes from Chattanooga, Tennessee, to

*The so-called rate making route is only 261 miles, for which the scale rate is 145 cents. (Doss' Exhibit 100-B, R. 624.)

Hiram, Georgia, a competitive station reached by the Southern Railway and the Seaboard. The rate is $1.10, which is made because of the 125-mile single-line route of the Southern Railway. It also applies via the competitive joint-line routes of N. C. & St. L. to Cartersville and Seaboard Air Line to destination, 135 miles, or Central of Georgia to Cedartown, Seaboard beyond, 132 miles, for which distances the joint-line scale rate would be $1.35. But the carriers in these routes meet the single-line scale of $1.10.† (R. 681; Burke's Exhibit 155-B; Crane's Exhibit 118-B; R. 658.)

There is a quarry at Graysville, Georgia, on the Nashville, Chattanooga and St. Louis Railroad just south of the Tennessee state line. (R. 417, 681, 746; Burke's Exhibit 159.) If this quarry wants to ship to Hiram, Georgia, its distance is 118 miles joint-line via Cartersville and the Seaboard Air Line. The interstate orders are construed as requiring the full joint-line scale rate for this distance, which requires the state producer at Graysville to pay $1.25, although his Chattanooga competitors north of him ship through on the interstate rate of $1.10, which is carried by this route to equalize with the single-line rate of the Southern Railway for its longer mileage. Under the tariff that the carriers have published in Georgia, they have clearly established a rate of $1.25 from Graysville to Hiram. The same situation exists to Rockmart.

The Graysville, Georgia producer also has to meet the competition of the interstate shipper from Birmingham,

†The Georgia Commission is prevented from requiring a $1.10 rate as maximum on the two-line route from Sparta, Georgia, to Geneva, Georgia, under which the producer in Georgia would be able to meet the competition of the one-line producer from Montgomery, for an equal distance. Yet the same railroad, the Central of Georgia, whose joint-line rate between those points must be not less than $1.25, engages in a joint-line interstate rate of $1.10 for 7 miles longer haul, from Chattanooga to Hiram!

who gets into Hiram on a single-line haul of 141 miles via S. A. L. and enjoys a single-line scale rate of $1.26. (Exhibit 123-B, R. 662.)

ALABAMA SHIPPERS ENJOY ADVANTAGEOUS SINGLE-LINE ROUTES.

The record will show that the shippers of Montgomery and Birmingham, Alabama, and other interstate shippers who supported the Section 13 complaint of the Atlantic Coast Line, *et al.*, before the Interstate Commerce Commission were fully conscious of the fact that their producing points were served by railroads having lines extending across the State of Georgia, so that they were able to reach the consuming territory in that state largely over single-line hauls in competition with producers in Georgia who were not similarly situated. The Georgia plants, to a much larger extent, had to make use of joint routes made up of two or more carriers. This fact was well known to the Commission from the evidence before it, when its orders herein were entered. (R. 732-3; Price's Exhibit, 161-B.)

The Commission's order represents a usurpation by the Federal government of the powers of the state, since it imposes on the state rates certain limitations and restrictions to which the state objects and which are not imposed on the interstate rates. The order requires that the state rates shall not be lower, distance considered, than the interstate rates, and in that requirement, says nothing as to the character of the hauls, whether single-line or joint-line. Yet the reading of the report as a whole indicates clearly that the Commission intended that a distinction be made as between single-lines and joint-lines; and as the carriers are complying with the

report, they are charging the full 17517 joint-line scale on joint-line movements in Georgia.*

An illustration of the arbitrary usurpation of the power of the state is afforded by the situation, Sparta versus Montgomery, to Geneva and Graysville versus Chattanooga and Birmingham, to Rockmart and Hiram, Georgia, which we have sufficiently described above.

It may perhaps be further illustrated by the freedom with which the Commission countenances the so-called weak lines in refusing to accept the so-called weak line arbitrary on their interstate rates where they sometimes take it and sometimes reject it. Yet, the state is enjoined to permit the full scale B rates on state traffic. This is illustrated along the Georgia & Florida Railroad.

For instance, from Ellenton, South Carolina, a producing point which is particularly mentioned in the decision, the shortest rail routes to various points in Georgia, such as Helena, Vidalia and Hazelhurst, are all figured via or in connection with the Georgia & Florida Railroad. The rates actually in effect to these stations are the Commission's scale A rates without the additions prescribed for so-called weak lines, of which the Georgia & Florida is one. That road waives this addition and thereby discounts the full scale basis. On the other hand, all of the standard line routes to these destinations are of longer mileage and would make higher rates under the scales than the amounts which have been published. So these are not cases in which a weak line is simply meeting competitive rates via standard routes. This situation is depicted on Chart E, in Appendix 3 to this brief. (See Atlantic Coast Line Exhibit 100-B, R. 624.)

It will be observed that the District Court came very near setting aside the Commission's order as undue in-

*This is covered in some detail in the text following Chart G in Appendix 3 to this brief.

lerference with the right of the state in the regulation of intrastate commerce and only refrained from doing so upon an interpretation of the order, which we would have great difficulty in accepting. This is discussed under proposition III below, pages 52-54.

THE ATTITUDE OF THE GEORGIA COMMISSION.

The record before the Commission clearly shows that the Georgia Commission at no time has taken a course or assumed an attitude in its treatment of the rates on these commodities calculated to reduce the railroad revenues or to accomplish a preferential level or plan of rates within the State of Georgia.

The history of the treatment and consideration of the rates on these materials by the Georgia Commission up to the entry of the Commission's first report in this case will be found stated on pages 140 to 146 of the first opinion. (R. 21-30.) That review is supported by the testimony of record. In brief, as a result of a petition filed by the Georgia railroads, the Georgia Commission undertook in 1917 to revise all intrastate class and commodity rates; and after an interruption due to Federal control, on February 25, 1925, a revision of the sand, gravel, and crushed stone rates was ordered by the Georgia Commission. In this revision, it substantially raised the state rates on which the traffic had largely moved within Georgia and the result was the carriers contemporaneously advanced their low interstate rates. The details of the change accomplished in the state rates as well as in interstate rates are all of record and are illustrated by the tables on pages 143 and 144 of the Commission's original report, Vol. 122 I. C. C. Rep. (R. 25-27.) There were certain unimportant mileage scales of rates which had been in effect in Georgia territory, on which very little traffic moved, but which pro-

voked a discussion as to the effect, on paper, of the Georgia Commission's revision. But the Interstate Commerce Commission said on page 145 of its opinion: (R. 29.)

> "While the Coast Line claims that such Georgia traffic as it originated prior to April 1, 1925, moved to a great extent on the Georgia scales then in effect, yet neither it nor any other carrier presented *any evidence or claim that the Georgia commission scales* of April 1, 1925, *resulted in reducing the carriers' revenue.*"

Further down on the same page, the Commission referred to the testimony of the witness for the Atlanta Freight Bureau, which is abstracted in the narrative testimony in the record (R. 596), indicating that the rates resulting from the scales prescribed by the Georgia Commission represented an annual increase of $114,415 in freight charges as against those under the prior rates, as measured by the traffic for 1925 of Fulton County and the City of Atlanta, which was said to represent about one-third of the total movement.

The Commission further held, quoting from page 146 of the opinion, *our italics:* (R. 30.)

> "Whatever may be said against the present Georgia scales the evidence justifies the conclusion that they served to raise depressed rates which were moving a large part of the traffic both intrastate and interstate to Georgia destinations to a more consistent basis than had existed."

The Commission is here referring to the rates prescribed by the Georgia Commission in April, 1925.

The Georgia Commission in that revision did not attempt to accomplish any favorable rate basis on Georgia state traffic as against interstate traffic. Its order tied the state rates to the interstate rates only to this very proper extent, namely, the Georgia Commission required

that no rate between any points in Georgia should be higher than the current interstate rate, for the same or greater distance, over the same line, the haul between the Georgia points being included in the longer interstate haul. (Page 140 of opinion, Vol. 122 I. C. C.; R. 21.)

The conclusion in the Commission's original report as to the intrastate rates within Georgia is illuminating and will be found on page 169 of the report. (R. 59.) Referring to the changes brought about by the Georgia Commission's aforesaid order of February 25, 1925, in the state rates, and indirectly in the interstate rates, as discussed on previous pages, the Commission said:

> "This order as we have seen resulted in raising many depressed intrastate rates applying between important producing and consuming points, and subsequently had the effect of bringing about substantial increases in important depressed interstate rates."

Following this statement is an express finding by the Commission, although negative in terms:

> "Considering the results brought about by this order it could not be found from this record to have brought about a rate situation which has in the past been unjustly discriminatory against interstate commerce."

The Commission then fixed the maximum interstate rates, in its aforesaid report entered January 21, 1927. This report named two scales, to be applied to mileages over so-called *rate-making routes*, to determine the measure of the interstate rates which, in actual practice, are applied over all routes, one, a so-called joint-line, and the other, a so-called single-line scale.

Thereafter the Georgia Commission, holding a hearing and considering all of the facts developed before it, entered its report of March 13, 1928, prescribing a single maximum scale of rates on sand, gravel and crushed

stone to govern strictly as maximum throughout the state. (R. 76.) This scale substantially advanced the rates on sand above the basis which the Georgia Commission had fixed by its order in 1925. It is to be noted that for many years the carriers throughout this territory, both on state and interstate traffic, had charged lower rates on sand than on washed gravel, the value of sand being substantially less. The Interstate Commission's order of January 21, 1927, fixed common scales for all of these materials, sand being elevated to the washed gravel and crushed stone rate basis. The Georgia Commission followed suit in its order of March 13, 1928, raising sand to the washed gravel rates. But instead of adopting the Commission's formula of a higher joint-line scale to be applied to joint-line mileages in determining the rate by the rate-making route, the Georgia Commission adopted the basis which the Interstate Commerce Commission had promulgated in the *Southern Class Rate Case*, and numerous commodity rates cases, namely, of a common scale to govern as maximum any movements, whether joint-line or single-line. In promulgating this scale, the Georgia Commission took the same view as the dissenting Interstate Commerce Commissioners, that the interstate scale for long hauls was too low, and fixed a higher maximum basis for single-line distances over 200 miles, higher than the Interstate Commerce Commission had prescribed.

From this review and from all of the statements in the Commission's decisions, it will be observed that the whole attitude and performance of the Georgia Commission has been to build up and increase rather than to reduce or bear down on the railroad revenues. It has never sought to create or maintain a rate basis favorable to Georgia shippers or receivers of these materials.

II.

The Commission's reports subordinate the question of the rates charged for actual transportation to the question of adherence to a rate formula.

One of the vital infirmities in the Commission's final report and order is that they subordinate the true question of the rates charged by the railroads for the actual services of transportation to the question of adherence to a rate formula. That is to say, the rates in Georgia which did not conform to the Commission's plan for constructing rates were increased, or reduced, by the enforcement of the Commission's final order, regardless of the true comparison between those rates and the services which they cover, on the one hand, and the rates really charged for actual interstate movements, on the other hand.

The interstate rate level, that is to say, the level of the rates actually charged by the carriers for interstate movements of sand, gravel, etc., is substantially lower than the maximum scale prescribed by the Commission as applied to the actual services of transportation.

In order to demonstrate the truth of the foregoing statements, it is necessary briefly to consider the nature of the interstate rate adjustment and the terms of the Commission's original order which prescribed the maximum rates for interstate application:

An analysis of the report and order of January 21, 1927, readily discloses that the Commission only undertook to prescribe the maximum rates for interstate transportation. It did not assume to fix minimum rates nor is the report fairly to be construed as attempting to fix the level of the rates, excepting as maximum.

The head-notes of the original report, (R. 12), the specific language of the findings on pages 165 and 166, (R. 54-5), and the specific language of the order refer only to maximum rates for the future. (R. 74.) The question is whether the report clearly implies that the full maximum rates would be exacted by the defendants, without departures therefrom or discounting thereof, and whether the findings of maximum rates were in such form as to fairly contemplate their use as absolute rates.

THE COMMISSION PRESCRIBED A FORMULA FOR COMPUTING MAXIMUM RATES VIA ALL ROUTES.

Superficially, the Commission's original report in these cases (122 I. C. C.), appears to prescribe a standard distance scale of rates for single-line application and another higher scale of distance rates for joint-line application, both scales being for use as maximum for interstate transportation of sand and gravel to the extent set forth in the findings, namely, from Montgomery and Chattanooga to points in Georgia, and from points in Georgia to points in certain other southeastern states. We say *superficially* it so appears, because on more careful examination of the findings and studying the way they were put in force and the only way that they could have been put in force without violation of their terms, it will be found that the single-line scale and the joint-line scale are not respectively applied to single-line and joint-line movements. They are merely factors used in a process of computation of the maximum rates that are expected to apply over all routes, whether joint-line or single-line, except routes wastefully circuitous. This may be demonstrated very readily by reviewing the terms of the report. It will be confirmed by contrasting this report with the findings in the *Southern Class Rate Case*, the

Southern Cement Case, and other cases, wherein the Commission previously had prescribed a single distance scale of maximum rates to govern all movements and all routes, with no distinction, real or pretended, between the single-line and the joint-line routes and mileages.

On page 165 of the Commission's original report (R. 55), is the finding that the rates from Montgomery and Chattanooga to destinations in Georgia and Mississippi and also to and from Georgia points generally for the interstate transportation of sand, gravel, etc.:

> "are and for the future will be, unreasonable to the extent that they exceed, or may exceed, rates set forth in the following tables, subject to a minimum weight * * *."

Then follows a table of single-line and joint-line rates, expressed in cents per net ton, and described:

> "*Table A.*—Distance scales for interstate application are over standard or trunk lines."

After this table appears a short paragraph, described as *Table B,* providing a basis of rates for transportation over so-called weak or short lines. A mere glance at *Table A* would give the impression that for a single-line haul of say 175 miles, the maximum rate would be, as shown in the table, 130 cents, while for a joint-line haul of that distance, the rate as shown in the table would be 140 cents per net ton. But that is not the fact, and a further reading of the report discloses that it is not the intended result of the Commission's finding.

The report continues with the following formula for the determination of the distances used and of the scale to be applied (P. 166 of the Opinion, R. 55):

> "In determining whether hauls are single-line or joint-line, carriers under common control or management shall be regarded as one line. All of the defendants and respondents are to be classed as standard lines for the purpose of these findings, except those

short lines for which special rate treatment is herein accorded.

In computing distances for the application of the foregoing rates, we find that the shortest routes shall be used over which carload traffic can be moved without transfer of lading."

Under the foregoing formula, it will be observed the distance from a particular point of origin to a particular destination is determined by ascertaining the shortest routes, over which carload traffic can be moved without transfer of lading, whether composed of a single-line or of several lines. The appropriate scale under Table A is applied to that mileage; single or joint line as the case may be. The rate thus ascertained is the maximum rate from that point of origin to that destination over all routes by which the materials may be hauled from that point of origin to that destination, and it makes no difference whether they are single-line or joint-line routes.

That is the only way in which we can interpret the formula; and it is the way in which it was translated by the carriers into their interstate tariffs.* The short line distance over a route composed of two or more carriers at the joint-line scale for that distance produces a certain maximum rate which may be lower than the maximum rate produced by applying the single-line scale to the shortest single-line distance between those two points, or the reverse may result. In either case, the lower maximum rate, ascertained by applying the joint-line scale to the shortest joint-line distance or the single-line scale to the shortest single-line distance in actual

*The tariffs themselves, described as J. H. Glenn's I. C. C. Nos. A-655 and A-529, were received in evidence by the court and name the interstate rates, in the form of specific rates from point-to-point. (R. 669-670.) Examination of the tariffs in the light of the statements of the various witnesses of record will confirm our description of them and of the method in which the rates therein were computed. See also our detailed explanation in Appendix 3 to this brief. (R. 669-670, 699, 770, 775-776.)

practice always governs as maximum over all of the routes by which the interstate traffic moves. Not a single instance has been shown of record of departure from this practice, except where extreme circuity exists. (See R. 759, 761.)

THE COMMISSION'S INTERPRETATION OF ITS FORMULA.

In the later report in volume 160, at pages 323-324, (R. 107-8), the Commission discussed our interpretation of its order and held that our contention that its findings and order require the maintenance over all routes between two given points of the rate established via the rate-making route is without merit. We would be only too glad to accept the Commission's interpretation as final, which means that the carriers are freely permitted to maintain over any interstate routes competitive rates to equalize shorter routes *between* the same points. Unfortunately, a very real difficulty arises from the artificial definition in the Commission's orders of what constitutes the *rate-making route*. The Southern Railway, for instance, may have a line of its own from point of origin A to destination B, over which it daily handles traffic in substantial volume. But this line of the Southern Railway from A to B is not *the rate-making route* from A to B, if there is a shorter route from A to B, even though that shorter route may be composed of the Southern Railway for part of the distance and a rival railroad for the balance of the distance, provided only that the Commission's joint-line scale makes a lower figure for that mileage than the single-line scale makes for the individual mileage over the rails of the Southern all the way.

THE RATE-MAKING ROUTES ARE THEORETICAL ROUTES.

Let us take a specific example of the many hundreds that can be cited from the record:

The Seaboard Air Line has its own individual line of railway from Montgomery, Alabama, to Everett, Georgia, over which the distance is 394 miles. Prior to the first decision in 17517, the Seaboard Air Line maintained in its tariffs a rate of 185 cents from Montgomery to Everett. What is the *rate-making route* from Montgomery to Everett and what rate did the Commission prescribe as the maximum reasonable rate from Montgomery to Everett on these materials, when transported by the Seaboard Air Line, over its rails, for 394 miles? The Commission's maximum *single-line* scale rate for that distance is 185 cents. But an examination of the maps and distance tables discloses that the so-called rate-making route as defined by the Commission, *i. e.*, the shortest route by which carload traffic may move, without transfer of lading, is over the Seaboard Air Line as far as Helena, and the Southern Railway from that junction to Everett, 314 miles. (Crane's Ex., 137-B; R. 666.) The Commission's *joint-line* scale rate for this distance is 175 cents. As a result, after the Commission's original order became effective, the Seaboard Air Line charged only 175 cents for transporting these materials over its individual line from Montgomery to Everett, although the maximum scale rate for that distance single-line was 185 cents, the rate which it had formerly charged. The precise language of the findings on pages 165 and 166 of the original report, (R. 54-5) literally and sensibly interpreted is, that 175 cents being the so-called joint-line scale rate, applied to the joint-line distance from Montgomery to Everett, is the

prescribed maximum reasonable rate over all open routes, not unduly circuitous, which will haul the materials from Montgomery to Everett. But if that is not the interpretation of the order, then we are driven to conclude that the Seaboard Air Line was not required to publish 175 cents via its line (and was only privileged to do so), but was ordered to join in 175 cents in connection with the Southern Railway, although this would be a plain violation of the provisions of par. (4), Sec. 15 of the Act, as construed by this court in the *Subiaco Case, United States, et al.*, v. *Missouri Pacific R. R. Co.*, 278 U. S. 269.

For another example, the Southern Railway runs from Birmingham, Alabama, to Shiloh, Georgia, a distance of 249 miles. In compliance with the first order it published a rate of 145 cents between these points, *via* its individual line, although the maximum rate for that distance would be 150 cents under the Commission's scale. It did this because by using the rails of the Central of Georgia for a part of the way, (to Columbus) and the Southern Railway for the balance, the so-called rate making route is formed of 191 miles, for which the joint-line maximum scale is 145 cents. (Crane's Exhibit, 121-D; R. 661.)

Witness Crane for the Southern Railway shows on his Exhibit 130-B, a rate of 210 cents from Mascot, Tennessee, to Mt. Pleasant, Georgia, for a distance of 478 miles over the so-called rate making route, as shown thereon, which is composed of the Southern Railway as the initial and delivering carrier with Seaboard Air Line forming an intermediate carrier in the route. But the Southern Railway has a line of its own all the way from Mascot to Mt. Pleasant and if shipments were received by the Southern Railway at Mascot, Mr. Crane admitted that they would probably move over the rails of his road

through Knoxville, Cleveland, Cohutta, Atlanta and Macon. (R. 673.) The distance by the Southern Railway's own line is 513 miles and the Commission's single-line maximum scale rate for that distance is 215 cents. But the rate under the Commission's decision, published by the Southern Railway from Mascot to Mt. Pleasant is only 210 cents, applicable over all routes. (R. 770.) This is a small difference between the scale rate and the actual rate, but it involves another decidedly peculiar feature of the case: The longest haul within the borders of Georgia is 460 miles. That is the longest distance for which the Georgia Commission has promulgated rates on sand and gravel. The Interstate Commerce Commission prescribes higher joint-line than single-line rates up to 480 miles only; beyond that distance the two scales are merged into one scale.

Mitylene, Alabama, is a local origin point of gravel served only by the Seaboard Air Line. (R. 763.) It is 9 miles east of Montgomery. The Seaboard Air Line has its own rails from Mitylene to Ochillee and Columbus, Georgia, distances respectively of 129 miles and 140 miles. The Commission's single-line scale for these distances makes 120 cents. But the *rate-making route*, using the Commission's definition, is a joint-line route composed of the Seaboard Air Line to Hurtsboro, Central of Georgia beyond. The distances over this route are 82 miles to Columbus and 93 miles to Ochillee; and the Commission's maximum scale for these distances is 115 cents. Consequently, the Seaboard Air Line is maintaining only 115 cents from Mitylene to Ochillee. That is, it discounts the scale from a non-competitive point of origin to a non-competitive point of destination on its own rails simply because of the aforesaid so-called *rate-making route* and the rate produced by applying the Commission's scale thereto.

The Atlantic Coast Line serves Columbia, South Carolina, and over its own rails can reach Pelham, Georgia, by a route of 470 miles. The Commission's single-line scale for this distance is 205 cents. By using the Atlantic Coast Line rails only part of the distance, however, a four-line route is available of 359 miles, made up of the Southern Railway, Georgia Railroad, Central of Georgia and Atlantic Coast Line. The Commission's maximum joint-line scale rate for this distance is 180 cents. The Atlantic Coast Line therefore has published 180 cents over its own rails from Columbia to Pelham. (Exhibit 100-B, witness Doss, page 19.)

We have cited five illustrations using five different interstate origin points and five different single-line railroads, all taken from exhibits filed by witnesses who were proponents of the Commission's final order. Each of these cases involves the maintenance by a single-line of railroad of a rate substantially lower than the Commission's scale would make as applied to the actual distance of transportation.

It will be observed that none of these cases involves the meeting by a carrier of a competing rate established over routes of other carriers. They are all cases where the Commission's definition of the rate making route has resulted in the single line of an individual carrier charging rates substantially lower than the Commission's scale as applied to the distance of haul over its line, simply because a lower rate is made by a joint-line route in which the same carrier would participate if it did not submit to short-hauling itself in contravention of the rule in the *Subiaco Case, supra.*

Instances Where Carriers Freely Discount Interstate Scales to Meet Competition.

The record is full of illustrations of cases where a single-line of railroad or two or more lines of railroad forming a joint route are maintaining from point of origin to destination the same rate as established by another carrier or another set of carriers between the same points. In such cases, of course, the rate charged by the longer route is substantially lower than the Commission's scale would make as applied to the actual distance of transportation. Instances of this kind are pictured in charts C and D, in Appendix 3 to this brief.

On the other hand, there are ever so many instances of record, where single-line railroad routes may be said to control the rates which are in effect over longer joint-line routes. For example:

The Southern Railway is not the rate making route from Chattanooga to Atlanta, under the Commission's first formula, the lowest rate between those points making via the rival line of the Nashville, Chattanooga & St. Louis. But to Gainesville, Georgia, a point 53 miles east of Atlanta, on the Southern Railway and served also by the Gainesville Midland, the Southern Railway is the rate making line, distance 201 miles. The joint-line route composed of the Nashville, Chattanooga & St. Louis Railway to Atlanta and thence the Seaboard Air Line to Winder, and the Gainesville Midland Railroad beyond, a total distance of 215 miles, takes the rate named by the Commission's formula on the Southern Railway mileage. If the Southern Railway is not the rate making line from Chattanooga to Atlanta, but yields that honor to its rival the Nashville, Chattanooga & St. Louis, and if joint-line scales ought to be maintained

higher than single-line scales, then why should the Nashville, Chattanooga & St. Louis and its connections be required to use the single-line scale of the Southern Railway for making their rate to Gainesville, the destination beyond Atlanta? Or, if the Southern Railway is meeting the competition of the Nashville, Chattanooga & St. Louis at Atlanta, shall it be said that the Nashville, Chattanooga & St. Louis via Atlanta is meeting the competition of the Southern Railway to the point beyond and to which Atlanta is intermediate over all routes?

The Interstate Rate Structure is Builded on Fictitious Routes.

We rather think the true characterization of the Commission's original basis is that it is not a plan wherein rates are made over routes that are truly rate making routes, in the practical legal sense of that term and other routes are permitted to meet the competition of the rate making lines. In truth the interstate system is one in which the rate making routes are fictitious routes or artificial routes, namely, the shortest routes by which carload traffic could move without interchange of loading, regardless of whether the traffic moves that way or whether it could be required so to route it under the limitations in Section 15 of the Act and their constitutional rights and that all routes which participate in the transportation are expected to and in fact do make the same rates as are maintained over the so-called rate making groups. There are, of course, innumerable instances of rates made to reflect true carrier competition: One is afforded by the situation from Birmingham to Atlanta, as revealed in sketch C in Appendix 3. Here the Seaboard Air Line has a single-line route of 166 miles for which the scale distance is 130. The Central of Georgia

moves traffic from Birmingham through Opelika in connection with the West Point route to Atlanta, a total distance of 232 miles. The carriers over this route are charging 130 cents to Atlanta because that is the rate via the Seaboard Air Line. It represents, however, a charge, for purely competitive reasons, and at the pleasure of the carriers, of substantially less for the interstate movement than the Commission's scale would make as applied to the distance of actual transportation.

III.

While the Commission's order ostensibly prescribes a minimum and a maximum basis for intrastate rates in Georgia, this minimum basis is vague, indefinite and uncertain.

In its preliminary opinion dated March 3, 1930, in respect of the denial of the interlocutory injunction, the District Court construed the Commission's order of December 9, 1929, as prescribing a minimum basis of rates for intrastate transportation in Georgia, as well as a maximum basis. (R. 165; p. 170 of 39 Fed. (2d).)

Reading the face of the Commission's opinion, it seems that a minimum basis was prescribed, but when we examine the opinion in the light of the evidence before the Commission, it is impossible to know definitely and with certainty what were the intended minimum rates. This becomes doubly difficult to determine when we consider whether the tariffs actually filed by the carriers to comply with that report properly provide only the minimum basis contemplated by the Commission or really name the full measure of the maximum rates prescribed.

The minimum prescribed for state traffic is thus described in the language of the final order (R. 116), "Rates which shall not be lower, distance considered,

than those contemporaneously applicable to the transportation of interstate traffic." What does that mean and what was it intended to mean?

For distances, over so-called rate-making routes, of 200 miles, in interstate commerce, the Commission had prescribed as maximum 135 cents single line and 145 cents joint line; and these amounts the final order named as maximum also for intrastate traffic. But for that distance the interstate rates actually charged by the defendants, as they participate in the transportation, are shown of record to be varying amounts, 120 cents, 130 cents, 135 cents, etc. Which of these rates is intended to govern as minimum against the intrastate transportation?

Also, in using the phrases "contemporaneously applicable" and "contemporaneously maintained" does the Commission mean as the interstate rate may be changed from time to time in the future or the rates as they were "now" in force on the date of the order?

Also, is the phrase, "distance considered" as used in the order, complete in itself, or is it to be implied and written into the order to mean "distances of joint-hauls" and "distances of single-line" hauls. Without the latter additions, the order would have brought about practically no changes in the existing rates in Georgia.

Appellants Petitioned the Commission for an Interpretation of the Order.

The appellants raised the foregoing questions, by a very definite and respectful inquiry of the Commission in a formal petition which was promptly filed by the Georgia Commission before the Commission's order took effect. This petition is dated January 10, 1930, and ap-

pears in full in the printed record. (R. 118.) The petition also assigned various particular errors against the Commission's report and order. It was perfunctorily and summarily denied by the Commission in an order entered February 3, 1930. (R. 7, 249.) The carriers proceeded to publish the rates in tariffs which were filed with the Commission at Washington and with the Georgia Commission, the latter rejecting the schedules as contrary to the state law. (R. 7.)

In Appendix 2 to this brief, we are reproducing for convenience several specific examples which were brought to the attention of the Commission involving various phases of the difficulty of determining what basis the Commission intended to prescribe as minimum for interstate movements within Georgia.

In presenting that petition, the appellants stated their presumption that the Commission's order of December 9, 1929, was intended to require the railroads to establish and charge on intrastate movements in Georgia: (a) rates which are no lower, distance considered, than the rates which the respondents contemporaneously applied to interstate transportation; and (b) rates no higher than set forth in the appendix to the report. Under such a broad interpretation of the order, however, the appellants expressed the view that the Commission's order was indefinite, uncertain and invalid and should be made clear by amendment or additions. We called particular attention to two features, *first*, the uncertainty as to the rates which the respondents apply to interstate transporation; and *second*, the uncertainty as to the rates set forth in the appendix to the report. The latter feature relates only to the proper interpretation of the maximum basis prescribed for interstate and also intrastate application, and therefore can be passed by in this portion

of our argument, for discussion only of the first feature, as to which we said:

As to the rates which the respondents apply to interstate transportation: The respondents, severally and collectively, apply to the interstate transportation of these materials in Georgia territory, varying rates for the same distances and they do not now adhere to any scale of rates for the distances transported over the actual routes of movement. As to which of these varying rates contemporaneously applied by respondents to the actual interstate transportation are to be accepted and used as the measure to which the state rates for comparable distances must conform is not stated in the report or definitely ascertainable. Is it then really intended that the respondents shall establish, on intrastate movements in Georgia, rates which are no lower, distance considered, than the *maximum* scale of rates which govern the shortest physical routes that might be used (and in some cases are used for some of the traffic), in interstate movement? That is to say, shall the interstate rates which have been prescribed as *maximum* for the shortest interstate routes but are actually applied over the longer interstate routes, be imposed as *minimum* rates in Georgia? If so, the Georgia Commission would be enjoined from requiring certain respondents to charge for certain distances in Georgia, rates of the same measure which the Commission permits them to continue charging on interstate traffic for the same actual distances.

The illustrations which were called to the Commission's attention in the petition for rehearing (see Appendix 3 hereto), involved, among other things, the inquiry whether if one respondent charges a certain rate for a certain distance for interstate transportation, the

order of December 9, 1929, then contemplates that other respondents shall maintain a corresponding rate for the same distances on their intrastate movements in Georgia? Or does the order contemplate that each respondent railroad is simply required to maintain for intrastate movements the same rate which it maintains or participates in for a corresponding interstate movement? Either answer to these questions presents great difficulties because the same carrier often participates in two or three different rates of different amounts for the same distance between different interstate points. But if each respondent is simply expected to maintain as minimum, the rate which it charges on an interstate movement of corresponding distance, regardless of what other railroads may be charging, we have the further difficulty that for many movements within Georgia the particular railroad is not and could not possibly be a participant in an interstate haul of equal length. For example, the Macon, Dublin & Savannah Railroad or the Gainesville & Northwestern participate in intrastate movements of 50 or 60 miles. They could not possibly participate in an interstate movement of that distance.

THE DISTRICT COURT'S INTERPRETATION OF THE ORDER.

We have referred to the difficulty over the meaning of the phrases "contemporaneously applicable" and "contemporaneously maintained," as used by the Commission in its prescription of the minimum basis for state traffic.

The District Court in its original opinion (page 170 of 39 Fed. (2d); R. 165), construed the word "contemporaneously" not to have what we regard as its ordinary future meaning, and two of the judges thought that it

did not refer to "the rates that may at any time in the future be applicable." The District Court said that in its opinion, the order, if it meant to fix the state rates on the minimum basis that may at any time in the future be applicable:

> "'would be unlawful, because, should in the future any of the interstate rates be altered, either by the railroads or by the Commission itself on the usual proceedings only, a change in the existing state rates would *ipso facto* result. Thus for all time in the future, until this order should be revoked, the Interstate Commerce Commission would have absorbed to itself the complete control of intrastate rates on these commodities, altering them by altering the interstate rates without the hearing as to then conditions which is required by Section 13 (4)."

The court below discussed the fundamental error of any such order by the Commission, so interpreted, and went on to say:

> "If this could be done as to these rates, it could be done for all rates in all the states. The complete control of intrastate rates could be reached by one general hearing in which it was determined that all State rates which differed from interstate rates were discriminatory and to be conformed to contemporaneous interstate rates, with future changes only such as the carriers or the Interstate Commerce Commission might make. This would have much in the way of simplicity and uniformity to commend it, but as the Constitution, which gives the federal government the right to regulate interstate commerce, has reserved the general control of intrastate commerce to the states, we think this result could be achieved only by altering the Constitution. Certainly the powers of the Commission under Section 13 (4) were not intended to be so stretched. The section contemplates investigation of particular situations under conditions then existing, with a full formal hearing, and authorizes interference with state rates only when there is disclosed a present, real, and substantial discrimination against, or other specific

> detriment to, interstate commerce. *Florida* v. *United States* (D. C.), 30 F. (2d) 116, 117. An order like the present one, applying to but one rate, would be as vicious in principle, and unlawful for the same reasons, as the most extreme one that has been supposed would be."

In other words, the District Court in substance holds that the Commission's order would be invalid, on the ground of invading the rights of the state in the regulation of commerce within its borders, if the minimum rate requirement in that order is addressed to a comparison with the contemporaneous interstate rates, in the continuing, future sense of that word. One member of the court, Judge Sibley, would so construe the term, but yields to the view of the other two judges for the purpose of sustaining the validity of the order.

On the other hand, if the report is to be construed in respect of the meaning of the term "contemporaneously," as the majority of the court felt it should be construed, thus establishing the validity of the order, it will be observed that the order simply required the defendants, on traffic within the State of Georgia, to charge rates no lower than they were at that time charging for the same distances on interstate movements, *i. e.*, as of the date of the order. This freezes the rates in Georgia, on the basis supposedly charged by defendants on interstate traffic as of December 9, 1929, although the railroads were granted expressly by the Commission *carte blanche* authority to reduce any interstate rate over any interstate route below the measure of the scale where another route between the same point of origin and destination maintained a lower rate—accepting for purposes of this statement the Commission's own interpretation of the terms of its orders.

We have no objection to the construction placed on the

order by the District Court, in relation to the meaning of the words "contemporaneously maintained," although we feel there is no warrant for that interpretation either in any decisions construing the term or in the practice of the carriers themselves.

Meaning of the Term "Contemporaneously Applicable."

There are only two reported cases which we have found under the administration of the Interstate Commerce Act dealing with the construction of the word "contemporaneous." This word does not appear in Sections 3 or 13 of the Act, dealing with unjust preference and undue prejudice, either among interstate rates or between interstate and intrastate rates; but it does appear in Section 2 of the Act, which prohibits one person receiving a transportation service for a less charge than another person pays, for "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." In construing this section of the Act, in a report entitled *In the Matter of Restricted Rates*, 20 I. C. C. 426, at page 434, the Commission adopted the view expressed by McPherson, District Judge, in the Circuit Court for the Eastern District of Pennsylvania, in *Mitchell Coal & Coke Co.* v. *Pennsylvania R. R. Co.*, 181 Fed. 403. That is to say, the court and the Commission held, that the words "contemporaneous service," as used in Section 2 of the Act, cover the time during which the discriminatory rates or practices remain in force. The Commission quoted from the court's opinion on this point, as follows:

> "In my opinion the well-known evil aimed at in section 2 requires the court to hold that the implied

> term in the comparison is the offending rates, making the word to mean, 'at the same time with the offending rates,' and that, as long as these rates remain in force, the services rendered to a complaining and to a favored shipper are 'contemporaneous' within the meaning of the statute."

These expressions seem to give the word "contemporaneous" the usual meaning reflected in the dictionary:

> "*Contemporaneous:* living, existing, or occurring at the same time; contemporary."

The Commission's orders are continuing orders, governing the future,

We believe counsel for the defendants and for the carriers will agree with us, that the Commission generally if not invariably uses in its orders the phrase "contemporaneously maintained" or "contemporaneously applicable" in their future sense, meaning to reflect the changes that may occur from time to time, and not relating to the rates current on the date of the order. These words are uniformly used by the Commission in its so-called alternative orders, relating to cases of unjust discrimination among purely interstate rates, and thereby permit the carriers to remedy the discrimination by reducing the prejudicial rate or by increasing the preferential rate, or partly in one and partly the other way, without reference to what were the rates in force on the date of the Commission's order.

In raising the question of the vagueness and uncertainty of the *minimum* requirement of the order, we ask the court to notice from the exhibits of record that we are not dealing merely with occasional instances in which the carriers, for competitive reasons, have established less than the scale rates for their interstate hauls. The record shows that *in countless cases* on interstate traffic, every carrier is charging for the transportation it

performs rates which are on the scale basis as applied to some other route of movement—competitive or merely potential. The scale rates are not applied to the actual interstate transportation. In an order based alone on distance, using the words "distance considered" and the further definition "according as they participate in the transportation" it seems impossible to determine with any degree of certainty whether the rate of 120 maintained from a certain point to a certain destination by the Southern Railway, or a rate of 130 maintained elsewhere by the Atlantic Coast Line, or a rate of 140 maintained somewhere else by the Central of Georgia, all for interstate hauls of the same distance, is to constitute *the minimum*, below which the state rate of the Georgia Railroad for that same distance in the state shall not be maintained.

IV.

The Commission's reports and orders are void because there are no findings of undue disparity between the rates charged for Intrastate transportation in Georgia, and the rates actually in force for Interstate transportation.

The Commission's power under paragraph (1) of section 15, and under paragraph (4) of section 13 of the Act, to enter an order prescribing rates for the future, either as minimum or as maximum, depends on a finding that the present rates are in violation of one of the substantive provisions of the law. If the rates presently charged by a carrier or carriers are in no respect unlawful, or are not expressly found by the Commission to be excessive, discriminatory, prejudicial or otherwise illegal, the Commission has no jurisdictional basis for requiring other rates to be charged in the future, either as maximum or as minimum.

The Commission's power to enter an order prescribing rates for the future, either as minimum or as maximum, may be exercised only upon a finding that the present rates are in violation of one or more of the substantive provisions of the Act.

Par. (4) of Sec. 13 of the Act.

(Par. (1) of Sec. 15 of the Act.

Interstate Commerce Commission v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 57 L. Ed. 431.

We may properly inquire, therefore, as to what findings are contained in the report as to violations of the law with respect to the rates which the Commission requires shall be charged for the future. It will be discovered the findings herein are not definite and specific, but general and indefinite. We shall later discuss the fact that the findings are not supported by the requisite evidence in the record.

THE FINDINGS OF THE COMMISSION ARE VERY GENERAL.

On page 325, of the Commission's report of December 9, 1929 (R. 110), is repeated the following finding which had been made in the original report:

> "there is no transportation reason for the maintenance of a basis of intrastate rates on these commodities within Georgia different from that there found reasonable for interstate transportation."

We seriously question, but will not now stop to discuss, whether a general conclusion of this nature is of any real weight or significance under the provisions of paragraph (4) of section 13, as considered by the Supreme Court in the *Wisconsin Passenger Fares case*, 257 U. S. 563. Certainly Congress could have made just such a provision in section 13, condemning *any basis* of intra-

state rates different from those found reasonable on interstate commerce, yet it did not do so. Bases of rates may be different and yet there may be no unjust discrimination in the rates themselves. Passing that question, we come to the next general finding on the same page of the Commission's final decision (R. 110):

> "that the circumstances and conditions affecting intrastate transportation within Georgia and interstate transportation * * * are substantially similar."

This too is a very general finding. The Georgia Commission has never contended, and does not now contend that the conditions are any different, *in general and on the average*, as between intrastate transportation of commodities and their transportation when crossing state lines into, out of or across the State of Georgia. But freight rates can not be dealt with in mere generalities. We do contend that for specific movements there are very substantial differences in the transportation conditions, frequently warranting different rates for hauls of the same mileages, and the evidence sustains this contention. Some elasticity is therefore necessary in the rate structure and is provided when only *maximum* scales are prescribed. The Commission's two decisions will be searched in vain for any specific findings respecting transportation conditions.

The third finding of the last decision, also on page 325 of the report, (R. 110), is—our *italics* and omitting unimportant language:

> "that respondents' rates applicable to the intrastate transportation of sand, gravel * * * between points in Georgia, *to the extent that they are lower, distance considered*, than the interstate rates contemporaneously applicable to the transportation of the same commodities * * * not exceeding the rates set forth in the appendix to this report and hereto-

> fore found and prescribed as reasonable for the interstate transportation of said commodities, * * * according as said respondents participate in said intrastate and said interstate transportation, *result and will result in undue preference* and advantage of shippers and receivers of freight in intrastate commerce within the said State of Georgia and in undue prejudice to shippers and receivers of freight in interstate commerce * * * and in unjust discrimination against interstate commerce."

The foregoing finding is unquestionably broad and comprehensive, yet it is very general and indefinite. It does not specify what intrastate rates are found preferential and only refers very broadly to such rates as are "lower, distance considered", than the interstate rates. There is hardly a rate in Georgia that is lower than some interstate rate maintained for the same distance and the record so shows.

The foregoing are the only findings directed against the rates as then in existence. They are so broad that they really add nothing to the language of the statute itself, which provides in substance in Section 13 that intrastate rates shall not be lower than interstate rates; and, of course, the statute implies, "distance considered," and implies all other factors shall be taken into consideration. The foregoing findings fall far short of complying with the doctrines applied by this court in the recent decision in the *Florida Log Case, supra,* that the mere existence of a disparity in rates between state and interstate traffic is not enough; that the justification for the exercise of the Federal power must clearly appear; and that the Commission must make definite and certain findings against the state rates to justify an affirmative order under par. (4) of Sec. 13.

We come now to the Commission's findings dealing with the rates for the future:

As a remedy for the aforesaid indefinite violations of law, ostensibly found by the Commission, the report then proceeds to prescribe a future basis of rates in this finding:

> "that said undue preference and undue prejudice and unjust discrimination can and should be removed by the establishment, maintenance and application to intrastate traffic between points in the State of Georgia of rates which shall not be lower, distance considered, than those contemporaneously applicable to the transportation of interstate traffic between points in the State of Georgia, and from points in other States in southern territory, except Florida, to points in Georgia, not exceeding the rates set forth in the appendix to this report and heretofore found reasonable in these proceedings for said interstate transportation."

The foregoing are the general findings of the report and they are the only findings of undue preference and advantage to state shippers and state commerce, and unjust discrimination against interstate commerce, requiring certain minimum and maximum bases of rates for the future on intrastate traffic. In respect to them, we ask the court to notice, (a) that a very great many of the state rates in Georgia were on the same basis as the interstate rates, that is to say, they were the full amount of the Commission's scales as applied to the actual distance of the transportation over the shortest route actually hauling traffic, and (b) that a great many other rates in Georgia were actually higher than the prescribed interstate maximum scales. (c) We concede that many of the Georgia rates for joint line hauls were lower than the maximum measure of the interstate scales would produce; but that is true of many interstate rates.

Distance Is the only Element Mentioned in the Findings.

The court will particularly note the words in the Commission's findings, "distance considered." The findings require intrastate rates no lower, *distance considered,* than those contemporaneously applicable on interstate traffic. Distance is the only test mentioned for determining whether the state rates were lower. Nothing is said in these findings about the character of the routes or the nature of the hauls. We assume these findings should be strictly construed and obviously they were very carefully drawn. They only require definitely that for a movement of a given distance within the State of Georgia, the rate shall be no lower than contemporaneously charged on interstate traffic for the same distance. They do not specify that a two or three line route in Georgia shall be subject to the same rates as a joint-line interstate route of the same distance.

If, therefore, the rate for a particular two line movement of 175 miles in Georgia was $1.30, (being the amount of the Georgia Commission maximum scale for that distance), it was not lower than the rate charged for *interstate* shipments moving 175 miles, when single line hauls, and therefore did not violate the letter of the foregoing findings, although it is true the Commission's intrastate *joint-line* scale for that distance made a rate of $1.40. The findings say nothing as to joint-line and single-line hauls, and refer only to distance.

We concede that other portions of the report and particularly the scales set forth in the Appendix and which are prescribed only as maximum, both as to interstate and as to state transportation, purport to make a distinction and rate difference between single-lines and joint-lines, in the application of the formula to rate-mak-

ing routes. But the basic findings of the report, as set forth above, and the prescription of a *minimum basis* on state traffic are limited to refer only to the distances involved, not the character of the routes or hauls.

The court will further observe that the foregoing general findings make no allowance for the specific transportation conditions affecting the particular hauls. The Commission's decisions, through more than 150 volumes of its reported cases, consistently and repeatedly hold that distance is not the only factor and indeed is not the controlling factor in rate making. We shall hereafter discuss these decisions.

For example, it must be conceded that where transportation is over a main line with heavy traffic density, low grades, with long trains of loaded cars and many trains per day of traffic in general and of a specific commodity in particular, the rates charged and the maximum rates that would be reasonable are much lower than somewhere else where for the same distance an occasional car of that commodity may move, over a branch line of light density, heavy grades, few cars behind the engine, etc. These circumstances may not be of controlling importance where the Commission is called upon only to fix a maximum rate which will be reasonably sufficient normally to control average movements through a particular territory. But they are of very great importance where it is proposed to fix a *minimum* rate as well as the maximum.

We respectfully submit that a decision which bases a finding of unjust discrimination on distance, as a sole controlling factor, is arbitrary and should be set aside, in the light of the repeated holdings of the Commission itself that similarity of conditions and circumstances of transportation depends on many factors other than mere distance.

DISTANCE IS NOT THE SOLE CONTROLLING FACTOR IN RATES.

The transportation law is well settled, under the repeated and unvarying decisions of the Commission itself, that the distance hauled is only one factor and by no means the controlling factor in determining the reasonableness of rates and the propriety of rate relationships or the existence of unjust discriminations. We shall quote three or four illustrative decisions:

In one of its earlier decisions, *Wilhoit* v. *Missouri, Kansas & Texas Railway Co.*, 12 I. C. C. 138, at 140, the Commission said:

> "Distance is something of a factor in the determination of the reasonableness or unreasonableness of a rate; but to permit it to be a sole or controlling factor would be to introduce discrimination, which would create chaotic commercial conditions under which irreparable injury would be done to individuals, firms, and communities without any compensating good resulting to the people or the commerce of the country as a whole."

In *Corporation Commission of North Carolina* v. *N. & W. Ry. Co.*, 19 I. C. C. 303, at page 309, the Commission stated (our ital.):

> "It is well settled that distance is always a factor to be taken into consideration in determining either the reasonableness of a rate by itself or *in considering its relation to rates to other points;* but *it is equally well settled that distance alone is not controlling.* Competition is an important element, and there are various other considerations, all of which must be taken into account in determining the fact whether a particular rate or a system of rates is or is not reasonable. Shippers and receivers of freight are entitled as a matter of law to rates that are reasonable, and that do not operate to unduly discriminate against them."

Again, in *Fort Dodge Commercial Club* v. *I. C. R. R. Co.*, 16 I. C. C. 572, at pages 581 and 582, the Commission said (our ital.):

> "Unquestionably mileage is a factor in the determination of the reasonableness of rates, but how important, or what effect it should have in judging the fairness of a challenged rate is a question which must be answered in the light of all the facts surrounding the exaction of the rate. Early after its organization the Commission held that *it was not the purpose of the act to compel the establishment of rates solely according to mileage*, and that the public benefits, the greater volume of business to carriers warranting lower rates to all, the force of competition, and many other potent considerations might far outweigh a claim of right founded only on geographic location. *Imperial Coal Co.* v. *P. & L. E. R. R. Co.*, 2 I. C. C. Rep. 618."

And in *Corporation Commission of Virginia* v. *C. & O. Ry. Co.*, 40 I. C. C. 24, at page 29 of the report the Commission stated:

> "The element of distance is an important matter to be considered in determining the reasonableness of rates in their relation to other rates with which they are compared, but distance alone is not controlling, and in many cases must yield to other and more weighty circumstances and conditions. *Corporation Commission, North Carolina*, v. *N. & W. Ry. Co.*, 19 I. C. C. 303, 308-309."

In the light of these and other like expressions by the Commission, surely a sweeping decision intended to overturn all rates throughout a state solely where lower *by a distance comparison*, is arbitrary and should be set aside.

The court will observe also in the foregoing findings that the respondent carriers are ostensibly authorized to establish as minimum on intrastate traffic in Georgia, rates no lower than those which the carriers may have voluntarily published on interstate traffic, notwithstand-

ing orders of the Georgia Commission to the contrary. In other words, the Commission in effect says that the action of the state regulatory body is entitled to less weight and to less respect than the action of the carriers, since the state-prescribed rates are set aside to the extent that they may be lower than the rates the carriers have chosen to establish for interstate application.

We have been discussing principally the general findings which constitute the Commission's formal statement of the conclusions reached in the last decision, in accordance with par. (1) of Sec. 14, and par. (4) of Sec. 13 of the Act. Of course, the remainder of the Commission's report is also of significance on these matters.

COMMISSION'S ILLUSTRATION OF ALLEGED DISCRIMINATION.

We are not overlooking the illustrations contained in the Commission's final report, principally those to be found in a table on page 316 thereof, (160 I. C. C.; R. 97-99). This table shows rates to seventeen destinations in Georgia, from various interstate points of origin and from intrastate origin points in Georgia with the short-line distance* governing each haul, the rates that are in effect and their relationship to the Commission's scales. The interstate rates are seen in each case to be on the full basis of the Commission's scales, with one exception, while all of the Georgia rates shown are less than the Commission scale by amounts from 5 to 25 cents per ton, save one which is 5 cents higher than the scale. This is not truly a comparison of interstate rates against

*In this table and in practically every one of the very numerous and extensive exhibits filed of record by the railroads and the complainants before the Commission, the distances shown are not by the short-line routes of actual movement, but are over fictitious routes or theoretical routes, namely, the shortest routes that can be formed by joining existing rails (regardless of ownership and operation), and over which carload traffic could be moved without transfer of lading.

state rates, but is rather a comparison of both state and interstate rates against a common yardstick afforded by the Commission's scales *and formula.* When we study the table in the light of all of the evidence of record, quite a different conclusion may be drawn from it than that it establishes an unjust discrimination between state charges and interstate charges.

Take the first illustration in the table which deals with the rate from Ellenton, South Carolina, to Cordele, Georgia, shown as 171 miles, and which is subject to the full Commission's scale basis of 140 cents. Against this, the report shows that from Holton, Georgia, to Cornelia, Georgia, a short-line distance of 157 miles, the rate is only 120 cents, or 10 cents less than the full Commission's scale.

Ellenton, Georgia, is a local station on the Charleston & Western Carolina Railroad, just north of the Savannah River, and about 23 miles east of Augusta. Cornelia, Georgia, is a local station on the Southern Railway about 77 miles northeast of Atlanta, on the main line coming down from Charlotte and Greenville, South Carolina.

There are numerous routes over which crushed stone produced at Ellenton may move to Cornelia, although there is not a word of evidence in the record to show there actually was a movement, or by what routes the carriers would transport the material if shipped. The shortest route that can be found is 173 miles, via Seaboard-Southern Railway; (Exhibit 100-B, p. 3); but the 140-cent rate applies over many other routes of substantially greater mileage, for which the Commission's maximum joint-line scale would make more than 140 cents.*

*Among these routes are Charleston & Western Carolina in connection with Blue Ridge and Southern Railway, 186 miles; Charleston & Western Carolina in connection with Georgia Railroad and Southern Railway, 189 miles; and Charleston & Western Carolina in connection with Georgia Railroad, Georgia Midland and Southern Railway, 218 miles.

On the other hand, from Holton, Georgia, to Cornelia, is a one-line haul over the Southern Railway, Holton being a producing point of gravel just north of Macon, on the Southern Railway line to Atlanta. It is true the single-line rate for this distance is 10 cents less than the full amount of the Commission's maximum scale for 157 miles, the short single-line distance. (Exhibit 100-B.) But there are plenty of cases where the various carriers on interstate transportation charge less than the full scale rate for 157 miles. For example, the Southern Railway distance from Chattanooga to Atlanta is 153 miles over the Southern Railway, which falls in the same rate-block as a haul of 157 miles, and although the Commission's scale rate for that distance is 130 cents, the Southern Railway only charges 120 cents, because it happens that the Nashville, Chattanooga & St. Louis Railway has a route of only 137 miles between Chattanooga and Atlanta, and the scale applied to that distance makes 120 cents. (R. 770.) Yet, if the Southern Railway is permitted to charge only 120 cents for an interstate haul from Chattanooga to Atlanta, what vice is there in its continuing to charge 120 cents for a corresponding distance from Holton, Georgia, to Cornelia, over its single-line route? And if joint-line routes are more expensive than single-line routes, as claimed by defendants, how does the existence of this single-line rate from Holton to Cornelia, intrastate, establish an unjust discrimination against the joint-line interstate rate of 140 cents from Ellenton to Cornelia?

The Commission's table next compares the 110 cent rate for the single-line haul of 118 miles from Pacolet, South Carolina, to Cornelia, which is on the scale, with the 110 cent intrastate rate from Norris, Georgia, to

Cornelia, which is shown in the table as 25 cents below the Commission's scale. The court will notice that we have here two hauls of almost exactly the same distance, one an interstate single-line, and the other a state joint-line, and the two take the same rate. That is not necessarily an unjust discrimination. It is true that from Norris, Georgia, to Cornelia, Georgia, is a two-line haul for Norris is on the Georgia Railroad, 72 miles northeast of Macon. The Commission's full joint-line scale, if applicable, would make 135 cents for the 127 miles from Norris to Cornelia, yet the rate actually in effect was 110 cents. (Exhibit 100-B.) There is not a word of testimony of record tending to show that transportation from Norris to Cornelia is any more expensive than from Pacolet to Cornelia, equal distances.

We can continue with the analysis of the table on page 316 of the report but feel that the examples already cited therefrom will suffice.

We, therefore, repeat that the differences and disparities reflected in the evidence and in the report are only with reference to the formulas and bases used in computing the rates and not with respect to the measure of the actual rates charged for the actual service.

The Evidence on Which the Commission's Findings Ostensibly Are Used.

The oral evidence and rate exhibits, while voluminous, deal for the most part with only one phase of the situation: The rates which were in effect and which would be in effect, applying the various formulas to the distances between points of origin and destination, arrived

at on the arbitrary or artificial plan of taking assumed routes made up of the shortest rails over which carload traffic could be moved without transfer of the lading and not the real distance of the actual transportation.

The court will notice that this method of computing distances and of arriving at the routes to be used for determining the rates, was adopted by the Commission in the so-called *Southern Class Rate case*, 100 I. C. C. 513. This was a very important proceeding in which the Commission's decision was very carefully considered and it has met with general approval. But in that decision, after adopting as rate-making routes, the shortest lines over which traffic could move without interchange of lading, the Commission proceeded definitely to reject the plan of two scales, one for single-line and the higher for joint-line application, pointing out that it was impracticable to do so, and promulgated one scale of class rates for all hauls of all kinds. This is what the Georgia Commission did in its sand and gravel case. We shall later discuss the question further.

The exhibits of record show a great many state rates in Georgia which were the same as the interstate maximum scales applied to the full actual distance over routes of movement. The evidence also shows a great many *interstate* rates, less than the full measure of the interstate maximum scales as applied to the actual lengths of the haul. In other words the evidence shows this condition: The interstate rates were arrived at by taking certain so-called single-line scales and so-called joint line scales, applying them to the so-called rate-making routes and then all routes participating in the transportation, whether single line or joint line, adopted this same rate.

It is true the evidence further shows that many of the

state rates for joint-line hauls were less than would have been produced by using the interstate formula *and adhering to the full maximum of the scales.* Yet it does not follow from this fact that these intrastate rates were *lower, distance considered, than the actual interstate rates,* if we are comparing the state rates and the service actually covered thereby, on the one hand with the interstate rates and the service actually covered thereby over the real routes of movement, on the other hand.

We assert the evidence, although voluminous, really fails to show anything more than this condition of discrepancy in formula rather than real disparity in rates. In support of this assertion we ask the court to notice the illustrations used in the Commission's opinions, of situations which purport to reflect a disparity between state rates and interstate rates. When analyzed, they will be found only to reflect the differences in formula and in the underlying mileage principles upon which the reports purport to rest.

Counsel for the Government, or for the carriers, will doubtless assert that our view of the evidence is quite too narrow and that we are misconstruing both the terms and the results of the Commission's orders. Let them offer an example taken from the evidence. It will probably be something like this:

From station A in Alabama to station B in Georgia, short line distance 125 miles over a two or three-line route, the interstate rate actually in effect is 125 cents, which is the full amount of the Commission's so-called joint-line scale for that distance. On the other hand, from station X to station Y, both in the State of Georgia, for a two or three-line haul of 125 miles, the rate in effect was 110 cents (this being the full amount of the Georgia

Commission's maximum scale for this distance), or 15 cents less than the interstate rate just mentioned.

If distance were the only and controlling element in rate making, this by itself might be construed as a disparity in rates. But fortunately it is not the only element, else the Congress or the Commission long since could have enacted a simple requirement for rigid mileage scales governing all transportation and saved a lot of expensive rate litigation. *Moreover,* in reply to any number of illustrations such as this one which the other side may offer, we can respond by a rebuttal showing of other *interstate* joint-line hauls of corresponding distances where the rates are actually ten, fifteen or twenty cents lower than the Commission's maximum scales, its joint-line scales, for the distances over the routes by which the traffic really moves. We have already presented such illustrations in preceding pages of this argument. In our present example, we may add there are many actual cases of interstate movements for 125 miles, joint line, at a rate of 110 cents.

Commission's Adoption of Principle of Higher Rates for Joint-Line Hauls.

The District Court assumed that the Interstate Commerce Commission had prescribed and is enforcing higher bases for joint-line hauls than for single-line hauls on all traffic, interstate and state, and that the Georgia Commission is requiring a common basis, of one scale to govern all hauls, as did the Interstate Commerce Commission in the class rate and in several commodity rate cases in Southern territory (p. 468 of 42 Fed. (2d); R. 171). Presuming that such difference *in actual practice* and performance is now claimed by counsel who are seeking to uphold the Commission's orders herein, we reply

that if the Commission is enforcing the principle in some measure on interstate sand and gravel traffic, of higher rates for joint-line than for single-line hauls, this is an unwarranted departure from the principle and rule which the Commission itself is applying generally to the interstate rates on other commodities.

Referring to the conclusions in the original report, pages 164 and 165 (of 122 I. C. C.; R. 52), we find the Commission stating its conclusion "that in the case of these commodities joint-line arbitraries may reasonably be permitted." In that opinion, in Table A on page 166 (R. 54), and again in the Appendix to the later decision (160 I. C. C. 327; R. 116), are set forth two scales respectively denominated "single line rates" and "joint line rates." This difference in rates prescribed as maximum disappears, however, in an extraordinarily large number of cases when the rates are established by the carriers for actual application to the moving traffic. For in real practice under the Commission's orders, wherever there are two or more routes, actual or *potential*,* between a point of origin and an interstate destination, all of the routes carry the same rate, except where extreme circuity exists. This rate is either the so-called joint-line scale applied to the shortest joint-line mileage or the single-line scale applied to the shortest single-line mileage, whichever makes lower; and all of the routes, whether single-line or joint-line, adopt this rate. Whether they are compelled to do so by the terms of the Commission's order or are simply permitted by the Commission to do so may be debated; but the fact is

*When we speak of potential routes, we refer to the so-called rate-making routes, which may or may not be actual routes, namely, the shortest routes over which carload traffic could be transported without transfer of loading. In many cases these are not actual routes and could not be enforced against the carriers under par. (4) of sec. 15. *United States* v. *Missouri Pacific R. R.*, 278 U. S. 269.

that all routes apply the common rate if they participate in the transportation.

In considering this whole question of alleged conflict of principle between the two commissions, and the absence of evidence to support the Commission's conclusion that joint line arbitraries must be enforced on intrastate traffic in Georgia, it must be borne in mind that there is a striking inconsistency with the Commission's action in numerous other cases. The Georgia Commission has only followed the course which the Interstate Commission has taken in other cases, with respect to class rates, cement rates, brick rates, rates on sugar, fertilizer, plaster and numerous other heavy loading and low grade commodities.

The District Court considered this phase of the case and was of opinion that the question whether compensation for the extra cost of joint-line hauls shall be had in a separate joint scale of rates or in a slightly higher average of rates, is within the competency of the Commission to decide. (P. 468 of 42 Fed. (2d); R. 171.) The court called attention to the conflicting decision of the Commission respecting the fertilizer rates, where a uniform interstate scale had been prescribed applicable alike to joint-line and single-line hauls, as involved in *State of Alabama* v. *United States*, 279 U. S. 229, remanded and again decided by the District Court for the Northern District of Alabama, 42 Fed. (2d) 469. That case now is again pending in this court by appeal.

We agree that it is for the rate making judgment of the Commission to determine whether rates for a joint-line service are reasonably and fairly to be made higher than rates for other single-line services. But this should be done by definite findings and upon a record of evidence which shows the comparative costs or the conditions of transportation governing the various services.

Principles Affecting Joint-Line Rates as Laid Down in other Decisions.

The Commission has not led the parties to suppose that in promulgating its order in this case it gave any real consideration to the principles or theories affecting the adoption of joint-line arbitraries or higher rates for joint-line hauls than for single hauls. There is nothing to reconcile what was done in this case with the expressions in this regard in the *Southern Class Rate Investigation*, 100 I. C. C. 513. The Commission there said, in the chapter devoted to joint-line differentials, page 627:

> "Joint-line differentials or arbitraries rest on the theory that a joint-line haul costs more than a single-line haul. But no attempt has been made to measure or even to estimate this extra cost, and the differentials proposed are the product of unguided judgment. Nor is extra cost in physical handling always incurred. If, for instance, all lines in southern territory were consolidated under a single ownership, it does not follow that the method of operation over what are now joint-line routes would in all cases, or even in most cases, be changed materially. While joint-line hauls ordinarily involve switching operations at the junction point and sometimes the transfer from car to car of less-than-carload freight, similar operations are common in the case of single-line hauls."

After mentioning the fact that many of the complications which have been urged as an objection to the application of uniform distance rates are created by the use of joint-line differentials, the Commission entered its finding:

> "That *no sufficient reason has been shown for joint-line differentials or arbitraries, but that the absence of such differentials is a factor which should be given some weight in determining the level of the distance scale.*"

After that finding, appears the following statement, which is of peculiar significance in the light of the recent decision of the Supreme Court in the so-called *Subiaco case*, 278 U. S. 269, under par. (4) of sec. 15 of the Act:

> "In this connection it should be noted that the fixing of the rate between any two points on the basis of a short-route distance does not mean, necessarily, that such route need be open for the movement of traffic. Carriers can not be required to short-haul themselves when they can secure a longer haul by a reasonably direct route; but if they choose the latter alternative it does not follow that the reasonable rate must be fixed by the longer route."

The decision in the *Southern Class Rate Case*, was based on extensive hearings and an intensive study by Commissioner Eastman into all of the transportation principles which must be considered in laying down mileage scales. The final reports as he drew them for the Commission fixed one scale for uniform application to joint-line and single-line routes alike, and in conjunction with the mileages over the theoretical routes representing the shortest hauls by which traffic could be transported without interchange of loading. He recognized that the one basis was inseparable from the other and that it would be impossible, without serious incongruities and countless inconsistencies, of the type illustrated in our discussion of this case, to attempt to set up two scales and to use theoretical routes for rate making purposes. A notable error in the Commission's report here assailed is its disregard of the principles discovered and recognized in the *Southern Class Rate Case*, and which were followed and applied in subsequent cases which we shall now cite:

In *Southern Cement Rates*, 132 I. C. C. 427, the carriers had proposed a scale of single-line rates and a higher scale of joint-line rates for shorter distances, the

two scales merging at 100 miles. But the Commission prescribed a common scale for single and joint-line application for all distances and made this scale apply over the shortest routes by which carload traffic could move without transfer of lading. No sound grounds have been stated by the Commission in its decisions in the cases here under review, and no facts were developed in the record before the Commission, which would justify a different rule to govern the interstate rates and state rates on sand and gravel, that is, respecting the treatment of joint-line versus single-line routes, than that which the Commission prescribed for Portland cement and for all commodities which take rates directly or indirectly related to the class structure.

It is hard to reconcile the sweep of the hand by which the Commission adopted a so-called single-line scale and a so-called joint-line scale in its report in this proceeding, without a word of explanation of the reason or necessity therefor, with what it has said and done in numerous other cases prescribing mileage scales on other commodities and without joint-line arbitraries, single scales applying alike to joint-line and single-line mileages. *Southeastern Sugar Investigation*, 132 I. C. C. 477; *Fertilizers Between Southern Points*, 113 I. C. C. 389; *Ohio Farm Bureau Federation Case*, 120 I. C. C. 361; *Salt Between Western and Southwestern Points*, 120 I. C. C. 91; *Western Cement Rates*, 48 I. C. C. 201; 52 I. C. C. 225; 69 I. C. C. 644.

In a number of other decisions wherein higher joint-line scales have been allowed to some extent than for single-lines, the two scales have merged at relatively short distances, as 70, 80 or 100 miles. *Lime Between Southern Points*, 129 I. C. C. 635; *Brick and Clay Products in the South*, 88 I. C. C. 543.

This court has already had before it the order of the Interstate Commerce Commission prescribing the rates on fertilizer and fertilizer materials in a Section 13 case which was brought up by the State of Alabama, *State of Alabama* v. *United States*, 279 U. S. 229. After further proceedings in the court below, 42 F. (2d) 469, that case is again to be considered by this court. In the underlying case, the Commission did just the reverse of what it is doing here in the matter of requiring a single scale for common use on all routes, whether composed of one or more carriers.

EVIDENCE LACKING BEFORE COMMISSION ON ESSENTIAL FEATURES AFFECTING JOINT-LINE HAULS.

In reviewing the evidence of record before the Commission and considering the intended effect of its conclusion with respect to rates for joint line hauls there are two remarkable circumstances which should not escape the notice of the court, both of which tend further to invalidate the order:

First, There is very little evidence, if any, as to whether important particular routes, in Georgia and also interstate, are to be treated as joint-line or as single-line routes under the terms of the Commission's reports. Competent and relevant testimony in that direction was offered and excluded by the presiding Examiner.

Second, There is no substantial evidence tending to show that joint-line hauls are necessarily more expensive than single-line hauls of corresponding distances, so that a higher scale of rates is proper or essential thereon for general application. To the contrary there is specific evidence to the effect that many joint-line routes are less expensive than other single line routes of the same distances.

In proposition V, we shall discuss the lack of evidence of record to support essential findings and shall there point to all of the evidence that is found of record dealing with transportation conditions. We desire at this point, however, briefly to discuss certain features that are omitted from the testimony and the result on the decision of the case.

Facts Excluded From Record Respecting Specific Joint-Hauls.

If it be admitted, for purposes of argument, that the rates for joint-hauls shall be higher than for one-line movements, then the question whether a movement from point of origin A to destination B is a joint-line movement or is to be treated as a single-line movement for rate making purposes is primarily a question of fact. It is purely a question of fact, when the definition has been adopted and the distinction between single and joint-line routes has been laid down.

The Commission's original report sets forth on page 166 that in determining whether hauls are single-line or joint-line, for the purposes of applying the prescribed maximum scales, "carriers under common control or management shall be regarded as one line." There is, of course, room for dispute—as a question purely of fact—whether a particular movement within the State of Georgia over certain lines is a joint-line movement properly subject to the joint-line rate basis as defined, or is to be treated as a one-line haul. Counsel for the Georgia Commission was obstructed in every effort to elicit the material facts bearing on two particular cases and objections to his questions were sustained by the presiding Examiner, so that the facts were not developed. We refer to the situation with respect to the Georgia, Southern &

Florida Railroad and the facts as to the Charleston & Western Carolina. (R. 660, 672.)

The Georgia, Southern & Florida Railroad Company is a separate railroad corporation which files annual reports with the Interstate Commerce Commission and the Georgia Commission; it is named in the tariffs as a carrier participating in joint rates and maintaining individual local rates, and its line is separately operated from the Southern Railway, although it is a part of the Southern Railway System.

The United States District Court for the Northern District of Georgia, King, circuit judge, and Ervin and Sibley, district judges concurring, entered their opinion and decree dated May 8, 1923, enjoining the Georgia Commission from enforcing upon the Georgia, Southern & Florida Railroad, a single-line basis of rates with the Southern Railway. *Georgia, Southern & Florida Railway Co., et al.*, v. *Georgia Public Service Commission, et al.*, 289 Fed. Rep. 878. The theory of the appeal by the railroads to the court and of the court's decision was that:

> "The fact that one railroad company owns a controlling interest in the stock of another company owning and operating a connecting line does not authorize the application of different rules as to traffic relations between them than those applied to other connecting lines."

The opinion of the court is of great interest in the present matter. What the carriers have now done with respect to the interstate rates on sand and gravel between the Southern Railway and the Georgia, Southern & Florida Railway is either all wrong *in principle*, or the court's decision was wrong. But the facts were not allowed to come out in the Commission's hearing. (R. 660, 672.)

The same peculiar state of affairs exists in the record with respect to the Charleston & Western Carolina Railroad. (R. 674, 694-7.) In a former decision of the Commission it was treated as operating two-line routes in connection with the Atlantic Coast Line Railway.

Sand and Gravel from Stations on the Charleston & Western Carolina Railway, 83 I. C. C. 436. It appears from that decision that the rates on sand and gravel from stations on that railway to points on the Atlantic Coast Line were formerly on a single-line basis and were advanced to a joint-line basis. In dealing with the rates for the future, the question is always pertinent as to what are now the facts; and it is commonly understood that the Charleston & Western Carolina is now under common management and control by the Atlantic Coast Line. The two roads are charging the joint-line basis, and the facts were not developed in this record.

Meager Evidence of Record to Support Higher Joint Line Scale.

There is very little evidence indeed in the original record in this case addressed to the question of joint-line differentials, or to the question whether the same scale should be applied to joint-line hauls as to single-line distances for arriving at the maximum rates to be charged respectively over the single or joint-line routes or commonly to both.

The absence of substantial testimony to indicate that joint-line hauls in Georgia, state or interstate, should be subject to higher rates than single-line hauls, because of any real differences in transportation conditions, is all the more striking because of what the Commission has held in numerous cases on this subject. We have al-

ready quoted from the *Southern Class Rate Case*. May we now invite the attention of the court to what the Commission elsewhere has held:

In *Sheridan Chamber of Commerce* v. *C., B. & Q. R. R. Co.*, 26 I. C. C. 638, at page 649 of the report, the Commission said:

> "Each carrier participating in a two-line haul will find that operating expenses for its portion of that haul are less than they would be if only a one-line haul to the junction point were involved, and instead of either delivering the car or receiving it from a connecting carrier, it were necessary to deliver it to the consignee or receive it from the consignor. The one-line haul involves two distinct terminal services. Each carrier's share of a two-line haul involves but one distinct terminal service, plus a switching movement from one carrier to the other. The entire two-line haul involves two distinct terminal services, plus the switching movement from one line to the other. In large cities, where the terminal of one carrier is far removed from that of the other, switching from one to the other often involves much greater expenditures than in the present case. However, it involves less expenditure than the terminal service of delivering to consignee or receiving from consignor at that station. But where the physical connection between connecting carriers is as simple as in these small western towns, involving no expensive terminal service, the additional cost due to the switching movement is very small, so small, in fact, that it may not properly be made the basis of an additional charge for a two-line haul of substantial length."

The foregoing language may well apply to these junctions in Georgia, but the evidence is lacking in this case along that line.

Again, in *Sand and Gravel from Lafayette, Ind.*, 77 I. C. C. 719, at page 721 of the Commission's report, it is stated:

"It is contended that normally the rate for a two-line haul, especially for short distances, should exceed the rates for single-line hauls for comparable distances, but while that principle has been applied in numerous instances, the reasonableness of the higher charge for a two-line haul must be determined from the facts and circumstances, not from the application of that principle alone."

In *Somers* v. *N. Y., O. & W. Ry. Co.*, 78 I. C. C. 243, the Commission stated at page 245:

"Defendants introduced no evidence to show that the two-line haul results in a greater cost of service than the one-line haul.

In *Coakley* v. *Director General*, 59 I. C. C. 141, we had under consideration rates on coal from the Carbondale district of Pennsylvania to South Utica, N. Y. The defendants contend that the rates to South Utica were justified on the ground that they covered joint movements over the Delaware & Hudson and the Ontario & Western as compared with the lower rates for one-line hauls over the Lackawanna or the Ontario & Western. In refusing to sustain this contention we said:

'We have frequently said that carriers may justify a reasonably higher rate for a two-line than for a one-line haul. *Investigation of Alleged Unreasonable Rates on Meats*, 22 I. C. C. 160; 23 I. C. C. 656. But the mere fact that one haul is two-line and another one-line does not in and of itself justify a higher charge for the two-line haul. The reasonableness of the higher rate "depends solely on the facts and circumstances made to appear which show an increased cost or some other fact or circumstance which would warrant a higher charge." *Stonega Coke & Coal Co.* v. *L. & N. R. R. Co.*, 39 I. C. C. 523, 551.'"

In the light of the foregoing decisions, the lack of any evidence whatsoever in this record to indicate that transportation of sand and gravel over two or more lines in Georgia territory is more expensive than when for like distance over single lines, surely constitutes a fatal defect in the case.

Same Carriers Must Serve Preferred and Prejudiced Points.

The Commission's report in finding unjust preference to the Georgia shippers and undue prejudice against interstate shippers, in general terms, has had the effect of increasing a great many of the state rates in Georgia which the Commission would not have changed if all of the rates had been interstate rates! The jurisdiction of the Commission over state rates is not a primary, direct and ordinary jurisdiction as is its authority over interstate rates. Surely it cannot be said that the Commission may require a change in a rate within a state under circumstances which would not warrant it in requiring such change if the particular rate were an interstate rate. Its secondary jurisdiction over intrastate transportation surely cannot go farther than its primary authority over interstate rates. Yet that has been done in this case.

The Commission has uniformly held that the rate from A to C (an interstate movement), cannot be held to be unjustly discriminatory in its relationship to the rate from A to D, or from B to C (both interstate), unless the same carriers participate in the several rates and unless, therefore, the alleged preference and the alleged prejudice *flow from a common source.* To state an extreme illustration, the Southern Railway cannot be adjudged guilty of undue prejudice for whatever rate it may maintain for 600 miles from a point in Georgia to Washington, because of a lower rate for like distance even under circumstances shown to be similar, but which is maintained by the Baltimore & Ohio Railroad from a point in Ohio to Washington, or by the Louisville & Nashville for like distance from a point in Georgia to a point in Indiana.

Yet in countless instances, the rates in Georgia which are being increased as the result of the Commission's decision herein are over a railroad which does not maintain or participate in a corresponding interstate haul. This feature was utterly ignored by the Commission, although called to its attention in argument.

We ask the court to notice what the Commission has said in other cases dealing with this principle. It has always held that the discrimination provisions of the Act must be applied to the carriers individually, not collectively. For example, in *Chicago Lumber & Coal Co.* v. *Tioga Southeastern Railway Co.*, 16 I. C. C. 323, the Commission held, (our italics) and quoting from page 332:

> "Regarding the charge of discrimination because of higher rates on the lines west of the river than east thereof, it is only necessary to say that a carrier cannot discriminate within the meaning of the statute except as between those whom it serves or whom it may lawfully be required to serve. It is not guilty of discrimination merely because it does not afford as favorable rates as others serving a different territory, though the products carried by each are brought to the same market. *The law does not deal in these matters with all carriers collectively as a single unit or system, but its commands are directed to each, with respect to the service which it is required to perform.*"

The courts have also taken a like view that there is no violation of Section 3 unless the particular carrier defendant is responsible for both the undue preference and the undue prejudice as alleged. So in *Penn Refining Co.* v. *Western New York & Pennsylvania R. R. Co.*, 208 U. S. 208, 52 L. Ed. 456, an order of the Commission under Section 3 was set aside as to the Lehigh Valley Railroad on the ground that that carrier was not responsible for the alleged preference and prejudice.

In *Interstate Commerce Commission* v. *Diffenbaugh*,

222 U. S. 42, 56 L. Ed. 83, was set aside an order of the Commission finding the Union Pacific Railroad Company guilty of a violation of Section 3 in respect of allowances paid to elevator operators. In that case in the Circuit Court (*Peavey & Co.* v. *Union Pacific R. Co.*, 176 Fed. 409, 424, 425), it was urged that the difference between the allowance paid at Omaha and the allowance paid at St. Louis constituted a violation of Section 3. The Circuit Court held that the fact that the Union Pacific did not reach St. Louis extracted "from this difference every element of unjust discrimination or undue prejudice." And as to this the Supreme Court said (222 U. S. 48):

> "But, as remarked below, the Union Pacific could not be complained of on this ground."

In *East Tennessee, V. & G. Ry. Co.* v. *Interstate Commerce Commission*, 181 U. S. 1, 18, the court set aside an order requiring the carriers to maintain no higher rates to Chattanooga than to Nashville, sustaining the contention of the carriers that the lines responsible for the preferential rates to Nashville were not responsible for the prejudicial rates to Chattanooga, Mr. Chief Justice White saying (italics ours):

> "The prohibition of the 3d section, when that section is considered in its proper relation, is directed against unjust discrimination or undue preference arising from the *voluntary and wrongful act of the carriers complained of* as having given undue preference, and does not relate to acts the result of conditions *wholly beyond the control of such carriers.*"

It must be remembered that under the law as uniformly construed by the courts and by the Commission, only such preferences and prejudices are prohibited as are unjust and undue. As to whether a particular preference is undue depends on whether the preference and the prej-

udice are created by the act of one carrier or set of carriers serving both points, and upon the existence of circumstances of similarity of transportation, beyond a mere equality of mileage.

The Commission's decision is arbitrary and should be declared void because it does not fulfill these requirements.

We would not invoke this principle if this were a case in which the Commission had made definite findings that the aggregate revenue of the interstate transportation system is being burdened by reason of subnormal intrastate rates on these materials, and if there was substantial evidence of record leading to such a conclusion. In such case, it may well be that an individual road might be required to raise its subnormal rates, even though satisfactory to it, for the adverse effect on the railroad situation as a whole. It is not necessary for us to consider that question here.

FOURTH SECTION, LONG AND SHORT HAUL, VIOLATIONS.

Under Section 4 of the Act, carriers may not lawfully charge more for transportation for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance, *excepting,* that in particular cases the Commission may authorize departures from this rule. This is known as the long and short haul rule; and while it relates to interstate rates, there is a corresponding provision in the Georgia statutes regulating state rates in that state.

Section 4 of the Act also contains what is commonly known as the equi-distant clause and which reads—

> "if a circuitous rail line or route is, because of such circuity, granted authority to meet the charges of a more direct line or route to or from competitive

points and to maintain higher charges to or from intermediate points on its line, the authority shall not include intermediate points as to which the haul of the petitioning line or route is not longer than that of the direct line or route between the competitive points;"

The interstate rates on sand and gravel in Georgia territory are shown by the record to be honeycombed with fourth section departures, or violations of the long and short haul principle, for which the Commission has ostensibly granted *general* authority or relief. Its orders authorizing such so-called fourth section relief go far beyond a mere exception in favor of "particular cases." It has whitewashed ever so many violations of the equidistant clause which we have quoted above. Such violations are really inherent in the Commission's formula for joint-line and single-line rates, to be met by competitive routes, as laid down in the original report herein.

On the other hand, there were few, if any, violations of these principles in the intrastate rates maintained in Georgia under the Georgia Commission's uniform scale governing both single and joint-line hauls.

The result of the final report and order of the Commission has been to create within Georgia numerous violations of the long and short-haul rule, for which the Commission has not granted authority and with which it does not expressly have power to deal under the language of the Act. Instances of this result will be found depicted on charts F and G in Appendix 3 to this brief.

We submit that an order having that effect should be condemned as arbitrary and void.

V.

There was no substantial evidence of record to sustain a conclusion that there was an unlawful disparity between the intrastate rates and the rates charged for interstate transportation.

The printed record is voluminous, and pages 250 to 813, or more than 560 pages of this printed record, comprise the narrative of the testimony, which is condensed. The original exhibits were certified to this court, but not printed, and consist of 346 separately numbered tables or statements of rates, statistics, etc.

It would therefore appear at first blush, that the Commission had before it a very comprehensive record. The appellees may assert that a record of this size contains many features of evidence which cannot be called to the court's attention within the scope of a brief or oral argument and that it supports every essential finding.

On behalf of the appellants, however, we assert that the great bulk of the exhibits and most of the oral testimony were devoted to a study of the rates in effect on interstate traffic and within Georgia, for the distances computed by the theoretical routes which we have heretofore described and without showing the mileages by actual routes of transportation. We further assert that in making up their record to show departures in the state rates from the interstate rate-making formula, the complainants and the railroad companies overlooked offering any proof whatever on other very essential features of the case. We have discussed certain of these phases of the case under the preceding section of this argument and shall here deal with only two phases of the evidence of record:

The record is wanting of evidence, either oral testi-

mony or exhibits of statistics or operating facts, tending to establish the transportation conditions, with respect to two major phases of the case:

First, there is an absence of showing that individual rates for individual movements in Georgia ought to be the same as the rates charged for individual interstate movements into Georgia, because of similarity of the governing circumstances and conditions. We do not assert that it would be necessary to establish this, in great detail, in any case where there is a general showing that the rates actually charged for the state movements are substantially lower than the general level of the rates actually charged for interstate movements. Yet there should be a sufficient showing to be representative, even in a case of that sort. In the present case, we contend there is not even a general showing that the rates actually charged for the actual transportation in Georgia are substantially below the general level of the actual interstate rates, but only a comparison of state rates against the prescribed formula.

Second, there is an absence of evidence tending to show that the transportation services are substantially more expensive or difficult where there are two-line hauls than for one-line hauls, so that a higher rate basis is necessary, to avoid unjust discrimination on the joint-line traffic than on the single-line traffic of sand and gravel.

The only evidence in the entire record dealing with the transportation conditions is very general and distinctly negatives rather than confirms any contention of similarity of conditions affecting individual rates which are required to be increased and likewise tends to disprove that conditions affecting joint-line movements are necessarily less favorable than for single-line movements of these commodities.

Mr. L. V. Crane, an official of the Southern Railway with long experience in rate matters, although not identified with the operating department, testified in the original hearings and was examined by the counsel for the friendly Alabama interests as to transportation conditions. We ask attention to pages 415 and 416 of the printed record. The witness said, in substance:

> "We have not felt that in the formulation of any mileage scale for our lines it is possible to take into account all of the different transportation characteristics on different parts of our line, where there are extremes of differences in the same territory and over the same lines, as, for example, North Carolina, the conditions are different on the main line from those on the Asheville-Salisbury line. There are operating details in the mountainous regions called difficulties, and there are divisions over which, by reason of grades, curves, etc., transportation costs are relatively greater than on the more favorable operating divisions. The most we can do in devising a comprehensive rate structure is to be guided by some thought of averaging the various instances and conditions as to operating details."

These statements by Mr. Crane seem to us to afford a very striking admission that the transportation conditions would warrant much higher rates on certain sections of railway and between particular points of origin and destination than on other sections and between other points. Stated conversely, the conditions would justify lower rates on certain sections or between certain points than elsewhere. This is enlightening because the interstate rate from Montgomery, Alabama, to Atlanta, Georgia, 176 miles, is 5 cents below the Commission's formula makes and less than its maximum scale.* (R. 690.) This is perhaps due to favorable transportation

*The shortest route and the rate-making route discounts the scale 5 cents; longer routes charge very much less than the scale would make as applied to their mileage.

conditions between those points. The state rate from Lowery, Georgia, to Atlanta, 180 miles, was also 5 cents below the Commission's formula and has been brought up to the full maximum scale basis by the Commission's order. There is no testimony of record tending to show that the transportation conditions from Lowery, Georgia, to Atlanta may not be extraordinarily favorable, in and of themselves, or as compared to the general interstate situation, so that a discount below the maximum scale may be proper, if the conditions are considered, from Lowery to Atlanta, the same or even greater than the discount actually being made by the carriers in their interstate rate from Montgomery, Alabama, to Atlanta over the rate-making route.

The only other testimony as to transportation conditions by the carriers or complainants before the Commission is meager and is very general. There was no operating witness in the entire case. The views of the traffic men as to operating conditions were all general and there were in fact only three expressions on that point which we can find in all the testimony.

Witness Doss, testifying as the traffic witness for the Atlantic Coast Line, simply expressed the opinion that the transportation and other conditions on the Atlantic Coast Line are such that varying levels of rates on these commodities are not justified and cannot be operated without causing discrimination and trouble. (R. 626.)

Besides Mr. Doss and Mr. Crane, Witness T. A. Burke, for the Nashville, Chattanooga & St. Louis Railway said, in effect, that there was no transportation condition on his line that he knew of that would justify charging relatively lower rates in Georgia than from Chattanooga to Georgia destinations. (R. 682.)

In the argument before the Commission the complain-

ants made quite a point of an admission of the principal witness for the Georgia Commission, Mr. E. M. Price, its rate expert, and which is reflected in a statement in our brief from which the Commission quotes on page 325 of its supplemental report, Vol. 160. This statement is to the effect that there is not claimed to be *any transportation reason* for a different basis of rates on intrastate commerce in Georgia than on interstate traffic into, out of, or across the State of Georgia. The appellants never have claimed that the state line is any impediment in transportation or that crossing that line means that a given service should pay a higher or lower rate than any other service wholly within the state. But that is not to say that any rate within the state which does not conform strictly to the interstate mileage scale is unlawful. Nor is to say that for given movements within the state the conditions may not be such as to warrant lower rates than commonly applied on other movements. Mr. Price's testimony (R. 773) was simply this, that he did not feel that when a shipment of sand and gravel crossed the Georgia-Alabama state line it should pay, *by reason of that fact*, any higher or lower or different rate than if under the identical distance and other conditions it did not cross the state line. He did not know of any difference in intrastate transportation conditions requiring the maintenance of a different basis of intrastate rates on these commodities within Georgia than found reasonable for interstate transportation.

Again, we remark, that this does not constitute a showing that from Junction City, Georgia, to Atlanta, Georgia, or from Norris, Georgia, to Atlanta, Georgia, or from Stockbridge, Georgia, to Brunswick, Georgia, the transportation conditions are such that rates lower than the Commission's general interstate formula may indicate for

those distances are preferential and unduly low. It does not indicate that the service between those points may not in fact be performed under such conditions that the rates therefor properly might be somewhat lower than the full interstate basis, just as the carriers have discounted the interstate scale from Montgomery to Atlanta where the conditions undoubtedly are favorable. The court will please take note that the carriers, in complying with the Commission's order, have increased the intrastate rate from Junction City to Atlanta from $1.00 to $1.10; the state rate from Norris to Atlanta has remained unchanged at $1.00; and the state rate from Stockbridge, Georgia, to Brunswick, Georgia, has been *reduced* from $1.60 to $1.50 by the assailed order. (Exhibits 169-B and 178-B.)

The second phase of the transportation testimony is with regard to single-line versus joint-line hauls. There is not a syllable of testimony in the record by any witness tending to show that a joint-line service necessarily is more expensive than a single-line service of the same distance, just because it is joint-line; and the only evidence on that point is to the contrary.

This lack of evidence is particularly striking in view of the fact, elsewhere herein discussed that as to the entire class rate structure, as to numerous other commodities, such as cement, brick, fertilizer, sugar, etc., the Commission has itself prescribed the same rates for single-line and joint-line application throughout the southeastern territory. In other words, the rule they are here pretending to apply on interstate sand and gravel traffic, and actually applying on state traffic, is an exception to their general rule and practice. If such exception is to be required and an order thereon confirmed against the State Commission, it would seem particularly neces-

sary that there should be definite evidence to establish that the joint-line conditions are essentially less favorable and require a higher basis of rates. The only transportation testimony on this point was given by Mr. Price who happened to be quite familiar with a particular movement as to which he stated the conditions. We refer to pages 779 and 780 of the printed record. Mr. Price there points out that the Commission's scale would increase the joint-line rates from Junction City, Georgia, to various stations on the Southern Railway, between Atlanta and the South Carolina state line, including Norcross, Buford, Gainesville, and Mt. Airy. These state rates from Junction City were subsequently increased by the carriers under cover of the Commission's order, through the substitution of the higher interstate joint-line scale for the common scale which had been enforced by the Georgia Commission against all hauls single and joint-line. Mr. Price mentioned the fact that the state rates from Rollo, Georgia, a producing point on the Southern Railway to Norcross, Buford, Gainesville, and Mt. Airy were not to be increased, because the hauls were single line and the Commission's interstate scale was the same as the Georgia scale applied thereto.

Mr. Price particularly developed in his testimony that the operating and transportation conditions from Junction City to these points were, if anything, more favorable than from Rollo to these points. He described in detail, as the narrative statement on R. 780 will confirm, that the single line service from Rollo to these junctions involved passing through the Atlanta yards by the same operating methods and subject to the same expense, as the joint-line traffic from Junction City when interchanged between the Atlanta, Birmingham and Coast Railroad with the Southern Railway.

We have here referred to all of the testimony in the record bearing on the transportation circumstances and conditions. There is no other testimony that we are able to find and none that was cited by counsel in the argument before the District Court.

We submit that this is an absence of any evidence to sustain essential findings of similarity of conditions and circumstances without which the Commission could not properly find undue prejudice and violation of Section 13 of the Act.

VI.

The Commission's order should be set aside because there were no findings or evidence that the intrastate rates were an undue burden upon the carriers' interstate revenues or that the alteration thereof would produce additional revenues.

In the bill of complaint in No. 563 the eighth ground of error alleged in the Commission's report is that there was no substantial evidence before the Commission which would warrant a finding of unjust discrimination against or of *any burden upon* interstate or foreign commerce, by reason of the rates maintained in Georgia. (R. 10.) It is also one of the assignments of error, No. 11, in the appeal to this court. (R. 177.) This point was urged in the oral argument before the three judges, but was not disposed of in their opinion. This court had not decided then the case of *State of Florida, et al.* v. *United States*, (Advance Sheets of present term, No. 5, page 212), in which another order of the Interstate Commerce Commission, directed against intrastate log rates in Florida, has been set aside.

As we understand the court's decision in that case,

the decree of the court below was reversed and the Commission's order therefore is enjoined because:

> "The Commission made no findings as to the revenue which had been derived by the carrier from the traffic in question, or which could reasonably be expected under the increased rates, or that the alteration of the intrastate rates would produce, or was likely to produce, additional income necessary to prevent an undue burden upon the carrier's interstate revenues and to maintain an adequate transportation service."

The appellants ask the court to notice there is an entire absence of any findings either in the original or final decisions of the Commission in this case as to the revenues, past and prospective, under the rates involved herein.

In the review of the evidence, in the final decision, there are references to the volume of the movement and the revenues of certain of the carriers. See pages 317 and 318 of the report in Vol. 160. (R. 100-1.) But these statements fall far short of being equivalent to findings, although correct so far as they go and in accordance with testimony of record. The facts thus set forth from the testimony are not truly indicative of the revenues which could reasonably be expected under increased rates proposed on state traffic, or that the new rates established in Georgia are likely to produce substantial additional revenues for the carriers.

We apprehend that in order to fulfill the requirement suggested in the *Florida Log Case*, findings are necessary, with substantial evidence of record to support them, that (a) the state rates actually charged are lower than the interstate level actually charged; and (b) that putting the state rates on the interstate level is likely to increase the income of the carriers. To establish burden on interstate commerce and upon the carriers' rev-

enues essential to maintain an adequate transportation service, it surely would not be sufficient to establish simply that increasing the state rates *to a higher level* would probably produce more revenue, without showing that the state rates in force were less than the interstate rates generally charged. Nor would it be sufficient to show that the state rates were less than the interstate level, if increasing the state rates probably would curtail the state traffic to a degree representing a substantial diminution in the total revenues.* In either case, there would be no undue burden on interstate commerce and interstate railroad revenues.

We have pointed out that there is no finding in the reports of the Commission as to the revenue feature of the intrastate rates, that is to say, showing that they are unduly burdensome on the interstate transportation system of the respondent carriers.

An examination of the voluminous record will disclose no substantial testimony tending to show that placing the state rates on the full maximum basis of the Interstate Commerce Commission's formula, will substantially increase the revenues of the defendant carriers. The evidence of the several witnesses is reflected in its strongest possible light by the statements on pages 317 and 318 of the Commission's report to which we have already alluded. (R. 100.)

It will be observed that if the testimony of Alabama shippers were to be taken at its full face value, the probable effect of increasing the rates in Georgia would be to increase the long-haul movements of gravel from the

*We adopt the expression of this Court in *Railroad Commission of Wisconsin* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563, at page 591:

"It may well turn out that the effect of a general order in increasing all rates, like the one at bar, will, in particular localities, reduce income instead of increasing it, by discouraging patronage."

Montgomery district, of slag from the Birmingham district and of stone from the Chattanooga district, into Georgia territory; and since it may be presumed consumption will not be increased, there would be a consequent diminution of the short-haul traffic within Georgia. The long-haul rates prescribed by the Interstate Commerce Commission are on a much lower basis than the corresponding rates prescribed by the Georgia Commission, so much so that the interstate order has resulted in reducing practically all single line rates in Georgia for distances over 200 miles. So much so, also, that three members of the Commission (Aitchison, Woodlock and Campbell), dissented in the original or supplemental reports. (R. 63, 112.) It seems quite possible, therefore, that increasing the rates in Georgia may so divert traffic that the carriers will be hauling more stone, sand and gravel for long hauls at relatively unprofitable rates and will be moving less traffic for short hauls at relatively profitable rates, so that their net revenues in the aggregate will be substantially diminished by the increasing of the short-haul rates within Georgia and the reduction in long haul state rates. We assert that this condition already has occurred since the order became effective and that it will be the real permanent effect of the order. There is no testimony to the contrary in the record; and there is much indirect or circumstantial evidence to support our assertion.

With respect to this whole revenue question, however, it will be particularly noticed that the only comparisons of record are between the revenues realized at the rates charged in Georgia and the rates that would be charged on the same traffic if the Commission's maximum scale basis were applied thereon. This ignores the true test of the state rates with the level of rates actually being

charged by the respective defendants for contemporaneous services of interstate transportation.

To clarify what we mean, take the situation from Montgomery to Atlanta: Undoutedly this represents by far the greatest volume of movement of these materials occurring between any specific points anywhere in Georgia territory, or in the states contiguous thereto.. The rate from Montgomery to Atlanta is 5 cents per ton less than the Commission's basis. (R. 690, 736, 754.) There is no route from Montgomery to Atlanta which is not charging a lower rate than the Commission's order fixed as maximum.* Of course, there is nothing in the Commission's orders requiring the carriers from Montgomery to Atlanta to charge the full scale basis and it was their privilege to shrink the rates. The fact is they are charging less than the Commission's formula would make for the distance involved; and we concede there may be favorable transportation conditions justifying the present rate. If that rate were advanced, however, to the maximum basis authorized by the Commission's order, it would produce many thousands of dollars additional revenue for the carriers. We claim it would produce more revenues for them than any rate in Georgia which has been raised could possibly produce because of the relative volume of movement. Knowing that this was true, the appellants requested the defendants in the hearing to produce the

*The mileage over the single-line or system route of the Western of Alabama and Atlanta & West Point Railroads from Montgomery to Atlanta is 176 miles, for which distance the maximum scale rate is $1.35. (R. 736.) The only other single-line route from Montgomery to Atlanta is via the Central of Georgia Railway and is considerably longer, 240 miles, for which the scale rate would be $1.50. The joint-line routes of the Seaboard Air Line in connection with the Central of Georgia, 236 miles, and the Louisville & Nashville, in connection with the Southern Railway, 238 miles, would be subject to scale rates of $1.60. But the interstate rate in effect over all these routes is $1.30. This appears from the tariffs, filed with the Court. (R. 669, 690.)

figures of the movement from Montgomery to Atlanta. The request was refused on the ground that it would be an unlawful disclosure of the business of the railroad patrons, *i. e.*, the several shippers of Montgomery. How specious was this objection will be seen when we point out that the same carriers already had filed exhibits giving the precise movements from individual plants in Georgia, to individual destinations fully disclosing their traffic affairs, to all who might read the record. (R. 685-687, 689.)

The appellants thereupon filed a formal motion with the Commission requesting that this information be adduced and the motion was denied by formal order of the Commission. (R. 245, 249.)

We venture to say that if the Commission would undertake an analysis of the revenues of the carriers, based upon a careful revenue study of the traffic which has moved for a representative period, it would be compelled to find: That by meeting the rates of competitive lines on interstate traffic, the carriers collectively have shrunk their revenues on interstate traffic many thousands of dollars per annum below what they would collect if the lines charged the maximum rate applicable for the actual distances of transportation between interstate points. That the foregoing shrinkage of revenue is quite comparable with the difference in revenues on state traffic collected at the rates in effect prior to the change required by the Commission's order and the rates that would result from charging the full maximum interstate scale on the corresponding movements. That the effect of applying the Commission's scale in lieu of the former rate adjustment is to substantially increase long-haul traffic at relatively unprofitable rates and substantially diminish short-haul traffic at relatively profitable rates.

We further contend that an examination of the longer haul traffic within Georgia will disclose that the Commission's order has brought about reductions of thousands of dollars per annum in net revenue on state traffic in Georgia, through changing the course of the business within the state, diverting traffic from one plant to another plant, both shipping to points in Georgia, (a) by increasing the relative volume of long haul and reducing the relative volume of short haul traffic; and (b) by cutting down the joint-line traffic, thus circumscribing the area of distribution of the Georgia plants.

Of course, these contentions and assertions are more or less speculative, since there is no definite evidence of record which we can cite as supporting them. But they go to the propositions on which we feel we are entitled to rely, namely, that the report lacks the findings cited by the court as requisite in the *Florida Log Case* and that there is no substantial evidence of record that would support such findings.

VII.

The Commission did not have a full hearing and make a due investigation, as required by the statute, sufficient to support a section 13 order.

We are not merely asserting that the Commission denied a full hearing to any party desiring to introduce proof, although material evidence was excluded which was strictly relevant to the issues in the case. The major defect in the Commission's procedure lies rather in a failure to investigate and develop the facts as to certain phases of the matter essential to the entry of a valid order under sections 13 and 15 of the Act. In other words, the procedural requirements of the Act have not been met by the Commission.

THE PROCEDURAL REQUIREMENTS OF SECTION 13 HAVE NOT BEEN MET.

Before the amendment of Section 13 by the Transportation Act of 1920 the Commission's authority to deal with intrastate rates which in some way infringe on interstate commerce, was an implied authority under the doctrine of the Supreme Court's decision in the *Shreveport Case, Houston East and West Texas Railroad Company* v. *United States,* 234 U. S. 342; 58 L. Ed. 1341. It is an authority which is now expressly conferred by Section 13 as amended. This authority is subject to a certain defined procedure. In place of stating this procedure or reviewing the cases in any detailed way, it may suffice to quote from an important so-called Section 13 decision, wherein the Commission itself defined the procedural requirements under Section 13, namely, *State Corporation Commission of Virginia* v. *Aberdeen & Rockfish R. R. Co., et al.,* 136 I. C. C. 173, at page 180: (The italics are ours.)

> "We pass to the point which the interveners make with respect to the reasonableness of the rates in issue. Where the issue is under Section 3 and only interstate rates are involved, we can make an order requiring the removal of undue prejudice without regard to the level of the rates. If in complying with such an order the carriers transgress section 1, the rates so filed can be suspended and dealt with accordingly. *Where the issue is between intrastate and interstate rates,* however, and undue preference of intrastate shippers or commerce and undue prejudice to interstate shippers or commerce are shown, *it is necessary in the first instance to determine whether or not the offense is caused by the intrastate or the interstate rates. Plainly we cannot require intrastate rates to be raised above a maximum reasonable level* in order to cure a disparity with interstate rates, and where the intrastate rates have been fixed, as they have been here, by the order of a State commission, they cannot be increased by the

carriers without an order from us. This situation is recognized in paragraph (4) of Section 13, which provides that where we find that any rate made or imposed by authority of any State *causes* any undue prejudice to persons or localities engaged in interstate commerce or any unjust discrimination against such commerce, we shall prescribe the rate 'or the maximum or minimum, or maximum and minimum, thereafter to be charged,' for the purpose of removing such prejudice or discrimination. *Obviously such an order cannot be made without consideration of the reasonableness of the rates in issue.*"

In that case the complainant had withdrawn its averments of unreasonableness under Section 1 so far as the interstate rates were concerned. The Commission then went on to say:

"It appears that the provisions of paragraph (4) above mentioned empower us to consider the level of the rates, regardless of any specific allegation, whenever an issue of undue preference and prejudice or unjust discrimination as between intrastate and interstate rates is raised. But by reason of the withdrawal of the allegation under Section 1, the interveners did not here present evidence with respect to the level of the rates, and to that extent at least the consideration of that issue in the record is not well balanced nor complete."

The requirements of Section 13 of the Act as thus defined by the Commission were not met in its investigation in the present case and objections to that effect were repeatedly urged during the course of the hearing before the presiding Examiner, the objections were overruled and exceptions were noted. The language of paragraph (3) of Section 13 of the Act, which we believe is not merely permissive but mandatory, contemplating cooperation with the state authorities, was not complied with by the Commission. Under the restrictive terms of the order of June 4, 1928, reopening the cases for further consideration, and under the Examiner's limitation of the scope of the evidence received at the hearing, the

other requirements of paragraph 4 of Section 13 have not been fulfilled.

The point we urge is that when the question of the proper level of the rates and what would be reasonable rates for the transportation of these materials in the future was expressly excluded from consideration and evidence relating thereto was ruled out, a jurisdictional bar was raised to the entry of any order under Sections 13 and 15 of the Act.

The Commission was here dealing with rates for the future rather than with the past. Section 13 of the Act requires a full hearing; and such hearing has not been had when any party to the proceeding has been denied the right of introducing any testimony on an important issue and of material facts that should have a bearing on the decisions to be entered.

That the Commission did so limit the hearing is evidenced by the language of the order of June 4, 1928, reopening the case (R. 240), from which we quote as follows, *italics* partly ours:

> "*It appearing,* that under date of January 21, 1927, the Commission issued a report and order in the above-entitled proceedings and in No. 17517 *prescribed a reasonable basis of rates* and minimum weights for the interstate transportation of sand, gravel (washed or unwashed) clay gravel, crushed stone, and slag, in straight or mixed carloads, *between points in the State of Georgia, and between points in the State of Georgia and points in other states in Southern territory,* except Florida, and that the said reasonable basis of rates and minimum weights was also prescribed in No. 17763 for the interstate transportation of sand, gravel (washed or unwashed), and clay gravel, in straight or mixed carloads, *from Montgomery, Ala., and Chattanooga, Tenn., to destinations* in Georgia;"

While the foregoing language recites that the Commission had prescribed a reasonable basis of rates, the mere assertion of a fact does not make that fact true or the

entire truth. The order theretofore entered was not by its terms the fixation of the future level of the rates in the manner and form necessary under Section 13 of the Act. It simply fixed the *maximum* level of the interstate rates by naming a scale to govern, *according to the shortest physical lines of railroad.* The Commission did not consider the reasonable absolute rates, to govern the actual routes of transportation.

The order of reopening under which the further proceedings were had further provided:

> "*It is ordered,* That No. 17517 be, and it is hereby, reopened for further hearing on the sole question of whether or not the rates and minimum weights required by the Georgia Public Service Commission to be maintained by said respondent railroads on intrastate shipments of sand, gravel (washed or unwashed), clay gravel, crushed stone and slag, in relation to the interstate rates and minimum weights prescribed as aforesaid causes, or will cause, any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate commerce or foreign commerce, on the other hand, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce."

An order of the Commission is not valid unless entered after full hearing and due investigation. Such full hearing has not been had, (a) because the reasonableness of the interstate rates and of the proposed intrastate rates was held not to be in issue and material evidence with respect thereto was excluded, and (b) because there is a most serious lack of any evidence dealing with the actual transportation conditions affecting the respective interstate and intrastate movements, other than the short-line distances.

It will be remembered the burden of proof is upon the carriers, under par. (7) of Sec. 15, inasmuch as the rates were proposed to be advanced herein.

VIII.

The District Court erred in not exercising its authority to set aside the Commission's orders.

The appellants submit that the District Court had jurisdiction to enter a decree setting aside the Commission's orders here assailed; that the District Court should have exercised that authority on the record made; that its failure to set aside the Commission's orders constitutes error and rests on erroneous conclusions; and that the reasons stated by the court below for denying relief are not sufficient and sound reasons.

It is certainly well settled under the decisions of this Court that the District Courts have authority to enjoin and set aside orders of the Commission which are beyond its jurisdiction, or void, on grounds which do not call for the substitution by the court of its judgment for the administrative judgment and discretion of the Commission.

It is fundamental that no order of the Commission can stand unless its conclusions and findings are supported by the evidence. *See Florida East Coast Ry. Co.* v. *U. S.*, 234 U. S. 167, 58 L. Ed. 1267; *Interstate Commerce Commission* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 57 L. Ed. 431; and *P. & R. R. Co.* v. *U. S.*, 240 U. S. 334, 60 L. Ed. 675.

Furthermore, it is to be particularly emphasized that the courts will always enjoin an order of the Interstate Commerce Commission where, although apparently in due form and within the Commission's statutory powers, nevertheless such order, as a matter of substance, shows an arbitrary exercise of power. *Southern Pacific* v. *I. C. C.*, 219 U. S. 433, 55 L. Ed. 283; *Tap Line Cases*, 234 U. S. 1, 58 L. Ed. 1185.

It was necessary, of course, in order to establish the contentions of our bill of complaint to tender all the evidence before the Commission in order to show that there was no substantial evidence before the Commission on certain essential phases of the case. This was done and the court has before it all of the testimony and exhibits which the Commission could have considered in the decision covered by the reports and orders here under attack.

We do not ask the court to weigh the evidence and decide whether the preponderance of the evidence is in support of the orders or against the orders of the Commission. We say there was no evidence of substantial character upon which the Commission properly could find that the intrastate rates were, in fact, unduly preferential to state commerce, and unjustly prejudicial against and burdensome upon interstate commerce. Under such circumstances, it devolves upon those who assert the validity of the Commission's order to point to that evidence upon which the decision is thought to be founded.

Nor do we ask the court to substitute its judgment and discretion for the administrative judgment and discretion of the Commission in the decision of questions within the Commission's jurisdiction and which were before it in the proceedings under review.

Counsel for the Commission customarily assert in the argument of cases brought to enjoin its orders, that the courts may not properly set aside an order of the Commission if there is a scintilla of evidence to support the order. It is probably the law that a record need only contain some substantial evidence to support the Commission's decision, in an ordinary case involving simply the exercise of its jurisdiction over purely interstate transportation. But we do not believe that is the law

when there is called in question the validity of rates made or imposed by authority of a state and where the effect of the Commission's decision is to set aside a prior, and in itself valid, order of a state regulatory body.

Under the constitution of the United States, the regulation of domestic commerce within the several states, and in particular the regulation of state railroad rates, is a matter within the control of the states and with which the Federal Government has no original or primary power to deal. When any act of a sovereign state dealing with its domestic commerce is called in question, such as a statute enacted by the Legislature or an order of the state commission fixing intrastate rates, the Federal judicial, legislative and executive departments must give full faith and credit to such acts of the state and not lightly interfere with them or set them aside except upon a clear, plain, and unmistakable showing of infringement of the superior rights of the United States, such as a clear and unquestionable discrimination against interstate commerce or a clear and unmistakable burden thereon. *Illinois Central Railroad Co.* v. *Public Utilities Commission of Illinois,* 245 U. S. 493, 510, 62 L. Ed. 425, 438; *American Express Co.* v. *South Dakota,* 244 U. S. 617, 625, 61 L. Ed. 1352, 1358; *Arkansas Railroad Commission* v. *C. R. I. & P. R. R. Co.,* 274 U. S. 597, 603, 71 L. Ed. 1224, 1226.

We would not state our understanding of these matters at this time, were it not for the position taken by the representatives of the interstate shippers and counsel and witnesses for the carriers before the Commission and for the nature of the Commission's order itself, all of which seem to indicate the impression that any difference between state and interstate rates should immediately prompt the Commission to enter an order

setting aside the state basis and substituting the interstate basis or formula; that the Commission needs only the opportunity or invitation to enter an order substituting its interstate schedules for a different basis of state rates; and that the burden of proof to justify any difference between rates in effect within a state and those theretofore prescribed by the Commission as maximum for interstate application, rests upon the state regulatory body and upon the shippers whose traffic moves under the state rates. That is not our conception of the law and if Sec. 13 of the Act were amended so to provide, we submit such amendment would be unconstitutional. *Minnesota Rate Case, Simpson* v. *Shepard,* 230 U. S. 352, 57 L. Ed. 1511; *Smyth* v. *Ames,* 169 U. S. 466, 42 L. Ed. 819; *Houston, East & West Texas Railway Co.* v. *United States,* 234 U. S. 342, 58 L. Ed. 1341.

In asking the court to enjoin the Commission's order, we take the position that there must be a certainty of showing before the Commission that there was a substantial preference of intrastate traffic and a substantial discrimination against or burden upon interstate traffic in respect of the rates actually charged over the actual routes of movement and for the transportation actually performed under the respective rates.

The appellants respectfully submit that for all of the reasons suggested on previous pages of this argument the District Court should have applied its jurisdiction and granted affirmative relief, by setting aside the orders of the Commission as erroneous, not based on essential findings and with no substantial evidence to support the erroneous findings. The failure of the court to set aside the orders of the Commission and the refusal to enter the interlocutory injunction and a permanent injunction constitute reversible error, under the several assignments of error by appellants.

We cannot accept as sound the reasons stated by the District Court in its two opinions for dismissing the bills and for upholding the validity of the Commission's order. Many of the statements made by the court below are answered by our statements on previous pages of this brief. It may be well, however, to state our understanding of what the court held and wherein that holding seems to us to be fundamentally erroneous.

The final opinion of the court below, 42 Fed. (2d) 467, opens with a reference to the effect that a preliminary injunction had been refused in the previous opinion; that subsequently a hearing had been had, and the record of the proceedings before the Commission was offered in evidence before the court. This evidence led the court to no different conclusion and it adhered to what had been said in the previous opinion.

We would not wish to show any lack of respect for the decision of the three-judge District Court; yet as a measure of the consideration which the court gave to the evidence, we are compelled to point out that the case was decided the day after it was heard and argued. In other words, the appellants filed with the court the voluminous transcript of testimony (2,219 typewritten pages) before the Commission and 346 numbered exhibits (R. 182) and argued the case forthwith, for a part of a single day's session, on June 23, 1930. The following day the court issued its order dismissing the bill. (R. 172.) This was subject, it is true, to an opinion to be filed later and which was filed under date of July 5, 1930. (R. 168.) But the order was signed by the three judges self-evidently without any opportunity to give the record sufficient study to determine whether it contained evidence on the very same points of deficiency to which we have herein directed this court's attention. The

opinion, filed two weeks later, was by a single judge. (R. 168.)

The court referred to its previous holding that both maximum and minimum rates were fixed by the Commission's order of December 9, 1929. The maximum so fixed was identical with that previously fixed for interstate shipments and was a mileage scale, and this scale was higher for joint-line than for single-line hauls and under it the court said the carriers had established a system of interstate rates which the Commission then prescribed as the intrastate minimum. These interstate rates were embraced in several tariffs filed with the Commission and in evidence before the court and consisted of hundreds of point-to-point rates between named places in Georgia and in other states. The court said that it was asserted, and assumed by it to be true, that the vast majority of these point-to-point rates are mere applications of the scale, joint or single-line, as the case might be, to the distances involved. (The court here completely missed the point that the rate-making distances were over theoretical routes, not reflecting the measure of service performed over routes of actual movement.) The opinion then goes on to point out that where there are several routes between two points the Commission had directed that all routes not circuitous beyond a fixed per cent might take the same rate and the lowest over any route, joint or single-line, by which carload freight might be moved without transfer of lading. Departures from the long-and-short-haul rule were permitted. After discussion of the contentions made as to this basis the court said:

> "The evident purpose of the Commission was to equalize rates in interstate and intrastate commerce, distance considered, under similar circumstances and conditions."

The court went on to say:

> "We see nothing to hinder the Georgia State Commission from causing the establishment of rates which will follow the same principles that were applied in fixing interstate rates where competition justifies departure from the maximum scale."

The competition here referred to by the court is simply carrier competition. The Georgia Commission may permit, or perhaps may cause railroads in one route between two points, to maintain a rate of the same amount that another railroad or railroads charge between the same point, at least so long as it avoids violation of the short-haul principle in paragraph (4) of section 15 of the Act. (278 U. S. 269.) But any order of the Georgia Commission will be null and void if it has the effect of requiring any carrier to charge from a given point of origin to a given destination in Georgia a rate equal in amount to what other railroads are charging for the same distance from another point of origin to the same destination. This is no less carrier competition, in the true sense of that term than is the case of one carrier meeting the rate of another carrier between the same identical points; but as it also involves the item of market competition, or would enable one producer to compete against another, or a given consumer to enjoy the privilege of having two sources of supply available at equal rates, for equal distances, the Interstate Commerce Commission is here apparently claiming a distinction.

The District Court further said in its opinion:

> "Had the Commission prescribed a fixed intrastate scale, the state Commission, or the carriers, would have been bound to establish it forthwith. When instead a maximum and minimum are fixed, as is allowed by Section 13 (4) the fixing of the exact rates *within these limits* is to be done by the state Commission on its usual procedure."

The Georgia Commission is unable to understand, however, how it may exercise its jurisdiction over state rates in view of the Commission's outstanding order in this case. Appellants particularly point attention to the fact that the schedules in evidence before the court fail to reveal any understanding by the carriers of a distinction between the maximum basis and the minimum basis as referred to by the court since they publish only the Commission's scales for application on intrastate commerce, rather than specific point-to-point rates as heretofore published for interstate shipments. (See Appendix 3 hereto.) Even on the court's interpretation of the effect of the order, we cannot understand why the schedules filed by the carriers were not enjoined, because they were contrary to the Georgia Commission's order under the state statutes, and not required by the terms of the Federal order here assailed.

The other features of the District Court's decision we have attempted to meet sufficiently by the affirmative argument presented in preceding sections hereof.

IX.

The District Court erred in not enjoining carriers from applying their schedules of new state rates in Georgia filed in ostensible compliance with the Commission's order.

The Commission's order of December 9, 1929, here under review, was by its terms effective on March 3, 1930. In ostensible compliance therewith, the various defendant carriers filed with the secretary of the Interstate Commerce Commission new schedules (bearing Interstate Commerce Commission numbers), and also sent to the Georgia Public Service Commission the same new schedules, substituting for application on intrastate traffic of

sand and gravel within the State of Georgia the full Commission scales, joint-line, single-line and weak-line, for those theretofore applied under the Georgia Commission's order. The schedules so tendered to the Georgia Commission were rejected as void and returned to the agent of the carriers immediately.

The filing of schedules with the Interstate Commerce Commission does not provide legally for intrastate rates in Georgia; or at least there is no provision either in the Georgia statutes or in the Interstate Commerce Act for establishing in that manner the rates to be applied within the state. The Commission's order of December 9, 1929, required the carriers to maintain certain minimum and maximum bases of rates in the future, but it did not specify in what manner the new rates should be established or how they are to be evidenced.

The new schedules do not name the specific rates, or show the amounts to be charged from named originating points to named destinations, but simply provide for the application on intrastate traffic in Georgia of the aforesaid mileage scales.

On the other hand, the interstate schedules of the defendants specify in cents per ton the rates to be charged from the various points of origin, which are named, to the specific destinations in Georgia, Alabama, the Carolinas, Tennessee, etc. These specific rates are not the full measure of the Commission's scales applied to the distances for which the shipments are transported, over actual routes of movement.

It is self evident that when the Commission prescribed for intrastate application in Georgia, (a) a maximum basis, *i. e.*, the scales, and (b) a minimum basis, *i. e.*, no lower, "distance considered," than applied on interstate traffic, it was not simply specifying one basis and that a

maximum-minimum, or *absolute*, basis of rates. When, therefore, the carriers published merely their full scale rates, effective March 3, 1929, on intrastate traffic in Georgia they published the full maximum basis as absolute rates and quite obviously went farther than the decision required as minimum regardless of all uncertainty as to just what minimum the Commission really prescribed. In so doing they exceeded also the rates which the Georgia Commission had prescribed as maximum rates for Georgia.

The schedules thus established for intrastate traffic in ostensible compliance with the Commission's order, as the carriers construed it, were received in evidence by the District Court and certified to this court as an original exhibit under the stipulation of counsel by which they may be fully considered and availed of in the argument and decision of the case without having been incorporated in the printed record. (R. 183.)

We have contended that the order of the Interstate Commerce Commission is void. If so, it affords no excuse or justification for the carriers' violation of the terms of the valid order of the Georgia Commission, fixing maximum rates in Georgia.

On the other hand, if the Commission's order were sustained as valid, it would afford justification to the carriers for violating the terms of the Georgia Commission's orders only to the extent that the interstate order clearly and definitely requires such violation and not to any further, or permissive, extent.

We contended before the District Court that under any interpretation of the Commission's order, it does not expressly require the carriers to establish or to maintain rates as high as they have published, *in innumerable instances*, and are now charging in Georgia. These higher

charges are in violation of the terms of the Georgia Commission's prior order, which is clearly valid to the extent that it has not been invalidated definitely by lawful action of the Federal government.

The remedy of the Georgia Commission in such a situation, ordinarily, would be by action to enforce the terms of its order, by injunction, or to apply the statutory penalties. But in this case, any such action would obviously involve the question of validity and of interpretation of the Commission's order.

The District Court, having full jurisdiction of the general subject-matter and of the parties, properly had the duty of entering any order necessary to a proper final disposition of the rights of the parties.

In order that a full, complete, effectual, and final decree adjusting the rights and equities of all parties in interest may be entered and enforced, a court of equity, once having assumed jurisdiction of a cause on any equitable ground will reach out and draw into its consideration and determination the entire subject-matter, bringing before it all the parties interested therein, and will retain such jurisdiction until all matters involved in the litigation between the parties or growing out of and connected with the subject-matter of the suit are finally disposed of. *Russell* v. *Clark*, 7 Cranch 69, 3 U. S. (L. Ed.) 271; *Hepburn* v. *Dunlop*, 1 Wheat. 179, 4 U. S. (L. Ed.) 65; *Leighton* v. *Young*, 52 Fed. 439, 3 C. C. A. 176, 18 L. R. A. 266; *Big Six Development Co.* v. *Mitchell*, 138 Fed. 279, 70 C. C. A. 569, 1 L. R. A. (N. S.) 332.

We therefore requested the District Court to enjoin the carriers from maintaining their schedules which purported to apply on this traffic intrastate in Georgia, rates which are in violation of the valid order of the Georgia Commission.

CONCLUSION.

That the Commission has the power to enter an order setting aside intrastate rates in Georgia on sand, gravel, crushed stone, etc., cannot be questioned, if it finds that the existing rates are unduly burdensome upon interstate commerce or unjustly preferential to intrastate shippers and traffic and unduly prejudicial against interstate shippers and traffic, in a real sense and to a substantial degree, *provided* there is substantial evidence to support such findings.

The appellants contend, however, that the Commission has not made the requisite findings to support an order setting aside the state rates in Georgia and that findings of the nature necessary to support such an order would not in turn be supported by substantial evidence in the record.

The Commission's conclusions are broad and sweeping and lack that definiteness and certainty, and reasonable degree of particularity which the appellants submit should be required in any case where the Federal Commission seeks to invade the field of regulation of state commerce which is inherently the right of the states.

Under cloak of the Commission's order, the railroads have established schedules of rates for intrastate transportation of the materials in question in Georgia, which are in violation of the terms of a valid order of the Georgia Public Service Commission, the regulatory body administering the state's functions as to transportation charges in Georgia. The Georgia Commission is powerless, in a practical sense, to enforce its order or interfere with the charging of these unlawful rates by the railroads because they rely upon the Commission's order as legalizing the schedules in question. Any suit to annul the schedules undoubtedly would involve the interpretation

and validity of the Interstate Commerce Commission's order.

The problems presented to the Commission in these rate cases are complex and difficult. Every presumption ordinarily should be indulged in favor of the Commission's conclusions, where questions of rate judgment are involved. The Georgia Commission would not like to see the courts substituting their judgment in rate matters for the judgment of the Commission. But where the Commission acts arbitrarily, departs from principles which the Commission itself has laid down as sound transportation law or principles of rate making, and does so without substantial evidence to justify its departures in principle or to support the conclusions arrived at, we submit such an opinion and order are not entitled to acceptance and approval by the courts. We particularly urge this in a case which fundamentally presents an instance of the Federal government imposing its superior power and authority in derogation of the right of the state to regulate the commerce within its own borders.

The appellants submit that upon the entire record the court below should have entered its decree and order granting the relief prayed for, setting aside the Commission's reports and orders and enjoining the unlawful schedules of state rates established by the railroads in Georgia; and that the decree of the court dismissing the bill is erroneous and should be reversed.

Respectfully submitted,

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Chicago, March 28, 1931.

APPENDIX I.

THE STATUTES.

The Interstate Commerce Act.

(41 Stat. L. 474; Title 49 U. S. C. Chap. 1.)

Sec. 1. *(As amended June 29, 1906, April 13, 1908, June 18, 1910, February 17, 1917, March 2, 1917, May 29, 1917, August 10, 1917, and February 28, 1920.)*

(1) That the provisions of this Act shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or

(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water; or

(c) The transmission of intelligence by wire or wireless;—from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation or transmission takes place within the United States.

(2) The provisions of this Act shall also apply to such transportation of passengers and property and transmission of intelligence, but only in so far as such transportation or transmission takes place within the United States, but shall not apply—

(a) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid;

* * * * *

(5) All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful;

* * * * *

Sec. 2. (*As amended February 28, 1920.*) (1.) That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Sec. 3, (1). (*As amended February 28, 1920.*) That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Sec. 4, (1). (*As amended June 18, 1910, and February 28, 1920*) That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this Act, but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance: *Provided,* That upon application to the Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section; but in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and if a circui-

tous rail line or route is, because of such circuity, granted authority to meet the charges of a more direct line or route to or from competitive points and to maintain higher charges to or from intermediate points on its line, the authority shall not include intermediate points as to which the haul of the petitioning line or route is not longer than that of the direct line or route between the competitive points; and no such authorization shall be granted on account of merely potential water competition not actually in existence:

Sec. 13, (1). (*As amended June 18, 1910, and February 28, 1920*) That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

(2) Said Commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

(3) Whenever in any investigation under the provisions of this Act, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this Act with respect to the relationship

between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this Act.

(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

Sec. 14, (1). (*Amended March 2, 1889, June 29, 1906, and February 28, 1920.*) That whenever an investigation shall be made by said Commission, it shall be its

duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made.

Sec. 15, (1). (*As amended June 29, 1906, June 18, 1910, and February 28, 1920.*) That whenever, after full hearing, upon a complaint made as provided in Section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Com-

mission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

* * * * * *

Sec. 15. (4) In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line), require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established: *Provided*, That in time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest.

Sec. 15, (7). * * *

At any hearing involving a rate, fare, or charge increased after January 1, 1910, or of a rate, fare, or charge sought to be increased after the passage of this

Act, the burden of proof to show that the increased rate, fare, or charge, or proposed increased rate, fare, or charge, is just and reasonable shall be upon the carrier; and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

APPENDIX II.

ILLUSTRATIONS OF INDEFINITE TERMS OF COMMISSION'S ORDER.

The following are referred to on page 50 of this brief, as specific examples which were presented to the Commission,* of indefiniteness and uncertainty as to the minimum rates intended to be prescribed intrastate in Georgia, by the order of December 9, 1929.

With respect to joint hauls: From Anniston, Alabama, to Atlanta, Georgia, the Louisville & Nashville Railroad in connection with the Seaboard Air Line maintain a through route over which traffic moves freely, the distance being 115 miles. The joint-line scale for that distance is 125 cents per net ton, under the appendix to the order of December 9, 1929, but the said railroads maintain a rate of 110 cents for said interstate transportation. Does the order of December 9, 1929, require that the Louisville & Nashville and Seaboard Air Line, for intrastate transportation over joint-line routes within Georgia, shall charge more than their said interstate rate of 110 cents for said distance, or, in other words, does it require that they shall charge within Georgia the full rate of 125 cents prescribed *as maximum* for that distance in the appendix to the order of December 9, 1929? Or, what rates are said respondents required by said order to maintain for said distance in Georgia?

*By formal petition filed January 10, 1930, by Georgia Public Service Commission, (R. 118). It was summarily denied February 3, 1930, (R. 249.) The petition is not here quoted verbatim.

For instance, from Elberton, Georgia, on the Seaboard Air Line, to Round Oak, Georgia, a joint-line distance of 112 miles, the present rate is 110 cents, being the Georgia Commission maximum rate for that distance under its order of March 13, 1928. Are these carriers to be required to charge 125 cents between those points because that is the scale rate for that distance under the appendix attached to the order of December 9, 1929, notwithstanding the joint rate of 110 cents now in effect for that distance from Anniston to Atlanta and notwithstanding the order of the Georgia Commission?

What are joint-hauls? The Georgia, Southern & Florida Railroad is generally regarded as a part of the Southern Railway system. The Georgia Public Service Commission, however, is under restraint of a decision of the United States District Court for the Northern District of Georgia, preventing the enforcement as to intrastate traffic, upon the Georgia Southern & Florida Railroad, of a single line basis of rates with the Southern Railway. The decree was entered May 8, 1923, on the petition of the carrier. *Georgia, Southern & Florida Railway Company, et al.* v. *Georgia Public Service Commission, et al.*, 289 Fed. Rep. 878. The record herein shows, however, that the Southern Railway is voluntarily maintaining interstate rates on sand, gravel, etc., from Alabama points on its lines to destinations on the Georgia, Southern & Florida Railroad under the Commission's single line scale.* What rates are to be established and maintained under the Commission's order of December 9, 1929, for the intrastate movement of these materials in Georgia between points on the Georgia,

*The record in these proceedings does not contain a showing of facts as to whether, and from what point of view, the Georgia Southern & Florida Railroad may be considered or ought to be treated as one line with the Southern Railway for purposes of applying sand and gravel rates under this Commission's decision herein.

Southern & Florida Railroad and points on the Southern Railway?

As a specific illustration, from Stockbridge, Georgia, to Cordele, Georgia, the distance is 134 miles via Southern Railway, in connection with Georgia, Southern & Florida. The present rate is 120 cents per net ton, which is the maximum rate under the Georgia Commission's order for that distance. This is also the single line rate under the appendix to the Commission's order of December 9, 1929. But the joint line rate for that distance under said order is 135 cents per net ton. Is this a joint-line movement under the Commission's *minimum* rate findings? Does the Commission's order supersede the decree of the court?

Short and weak lines: The decision of December 9, 1929, refers on sheet 6 to the arbitraries over the so-called standard line scales authorized to so-called weak lines. The appendix to the order of December 9, 1929, provides in Table B for an arbitrary to the short lines or weak lines of 25 cents per net ton. One of the so-called weak lines or short lines in Georgia named in the Commission's original decision (122 I. C. C., at page 175), is the Georgia & Florida Railroad. Another is the Wrightsville & Tennille Railroad. Neither of these railroads is now charging in its interstate rates any arbitrary over and above the so-called standard line basis. Does the report require that they shall do so as to intrastate movements?

Specifically, take the Georgia & Florida Railroad: The published rate from Birmingham, Alabama, to stations on this railroad, Cottle, Georgia, to Sparks, Georgia, inclusive, is 175 cents per ton for distances ranging from 384 miles to 392 miles. The maximum rate authorized by the scale printed as appendix to the order of December

9, 1929, for these distances, is 215 cents per ton, including the weak line arbitrary. What rates or what basis of rates shall be charged intrastate in Georgia to and from points on this and other so-called relief lines?

On sheet 14 of the tentative report, it is stated that the findings and order will automatically adjust themselves to situations where a short or weak line does or does not assess the arbitrary. The appellants inquired as to the definition of this *automatic adjustment*.

As to single-line rates: From Stockbridge, Georgia, to Brunswick, Georgia, an intrastate route over the Southern Railway, the single-line distance is 256 miles which is the shortest rail distance between those two points. The rate actually in force over the Southern Railway as of December 9, 1929, was 160 cents per net ton, which is the maximum rate prescribed in the Georgia Commission's order of March 13, 1928. The single-line rate for that distance shown in the appendix to the Commission's order of December 9, 1929, is 150 cents per net ton. Does the report require or contemplate that the Southern Railway must *reduce* said rate for said intrastate transportation? If so, by what authority?

Again, the interstate rate over the Atlantic Coast Line Railroad from Montgomery, Alabama to Camilla, Georgia, a one-line haul of 244 miles, is 140 cents per net ton. That is the shortest *single-line* route from Montgomery to Camilla; and there is a considerable movement over that route under the 140 cent rate.* The rate for that distance under the appendix to the Commission's order of December 9, 1929, is 150 cents per net ton. On the other hand, within Georgia, over the Atlantic

*There was a somewhat shorter joint-line route, subject to a rate of 140 cents. But it is made up of the Central of Georgia, Seaboard and Atlantic Coast Line, and would short haul the Atlantic Coast Line, contrary to the principle of the Subiaco case, 278 U. S. 269.

Coast Line Railroad from Saffold, Georgia, to Fleming, Georgia, the actual distance is 244 miles, (being also the short-line), and the present rate is 150 cents per net ton which is the maximum rate for that distance fixed by the Georgia Commission's aforesaid order of March 13, 1928. If, however, the Atlantic Coast Line Railroad is to comply with our interpretation of the order of December 9, 1929, is it to *reduce* its *intrastate* rate from Saffold to Fleming, 244 miles, to 140 cents per ton, because that is the rate which it is contemporaneously applying interstate for its single line haul of 244 miles from Montgomery to Albany? If so, by what authority is such reduction in said Georgia intrastate rate? If not, why should the state rate *exceed* the interstate rate of the same railroad for the same distance?

The foregoing illustrations deal with single-line rates, *maintained by the same carrier*, state and interstate. If one railroad charges a certain rate for a certain distance for interstate transportation, does the order of December 9, 1929, contemplate that *other* railroads shall maintain a corresponding rate for the same distances on their intrastate movements in Georgia, or is each respondent railroad simply required to maintain intrastate the same basis which it maintains interstate?

APPENDIX III.

Illustrative Rate Charts.

The following seven charts, depict various illustrations referred to in the argument, *supra*, of the application of the maximum and minimum requirements of the Commission's orders to particular railroad routes and from given points of origin to given destinations.

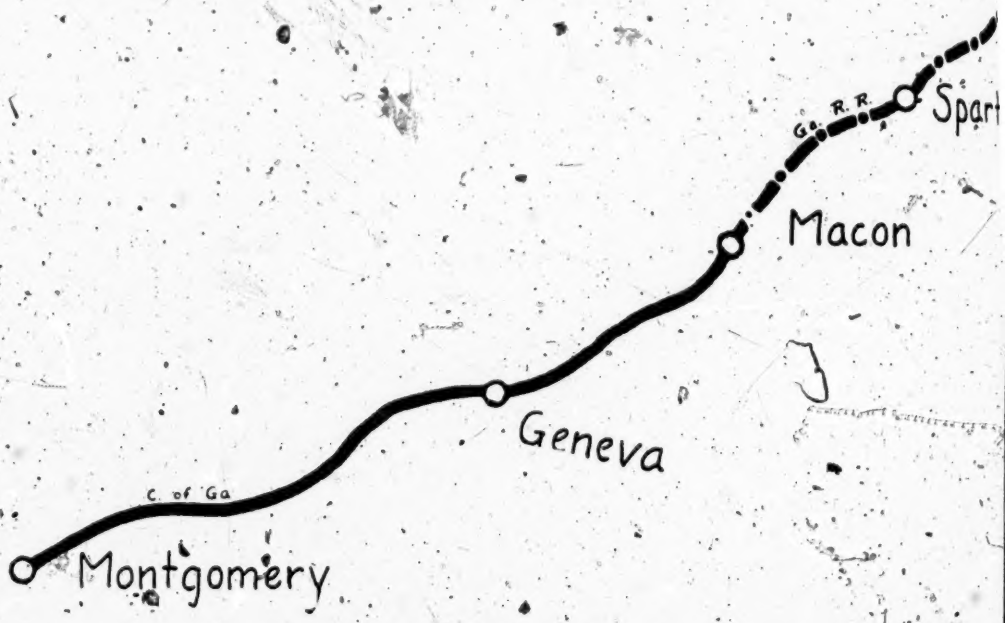
General Description of Tariffs.

Memorandum referred to in foregoing printed argument, *supra*, describing the terms of the railroad tariffs in evidence before the court, with illustrative reference to the situation pictured on chart B herein.

Montgomery, Alabama,—produces gravel and sand.

Sparta, Georgia,—produces crushed stone.

Geneva, Georgia,—an illustrative destination.



FROM SPARTA TO GENEVA.

Distance 125 miles via Georgia Railroad and Central of Georgia Railway. The rate was $1.10, being the maximum rate for that distance prescribed by the Georgia Commission. It has been increased by the carriers to $1.25 under the assailed order.

FROM MONTGOMERY TO GENEVA.

Distance also 125 miles, via Central of Georgia. The interstate rate is $1.10.

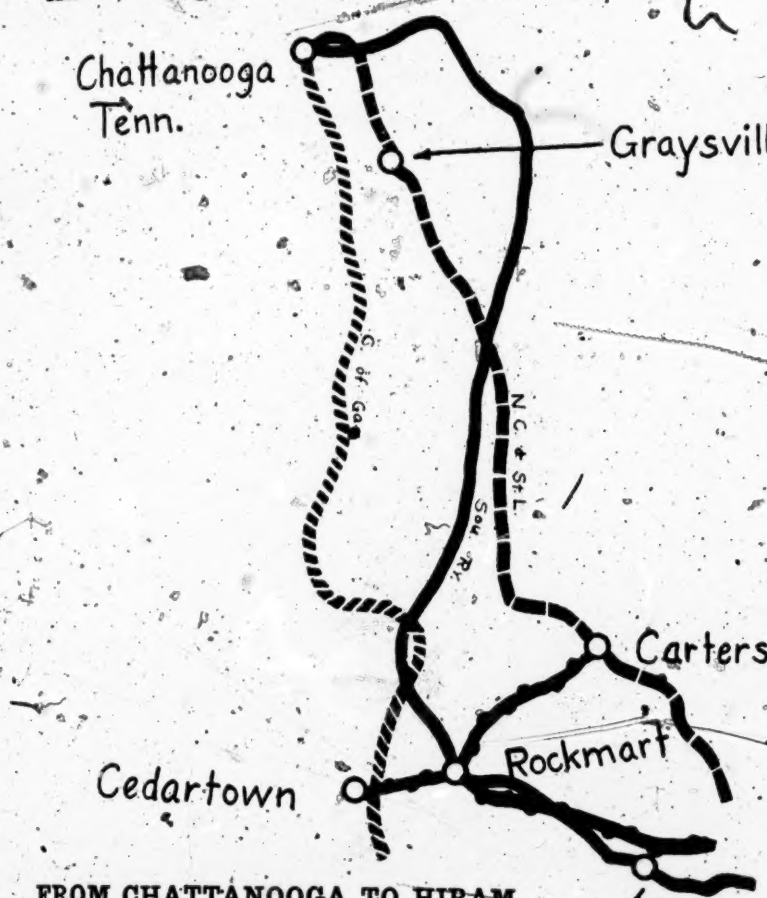
Note:

The class rates to Geneva are the same from Sparta and from Montgomery, under the Commission's **Southern Class Rate Case**; and the same rates apply from Sparta and Montgomery to Geneva on cement, fertilizer, brick, sugar, etc., under other orders of the Commission.

B

Chattanooga, Tennessee } both produce crushed stone.
Graysville, Georgia }

Hiram, Georgia,—an illustrative destination.



FROM CHATTANOOGA TO HIRAM.

The interstate rate is $1.10 and applies via three routes:

Via Southern Railway, distance 125 miles, for which the Commission's scale makes $1.10.

Via Central of Georgia to Cedartown, Seaboard Air Line beyond, 132 miles, for which the Commission's joint-line scale would make $1.35.

Via N., C. & St. L. Railway to Cartersville, Seaboard Air Line beyond, 135 miles, for which the Commission's joint-line scale would make $1.35.

FROM GRAYSVILLE TO HIRAM.

Distance 118 miles, via Cartersville. The maximum rate under the Georgia Commission's order was $1.10. The N., C. & St. L. and Seaboard have increased this rate to $1.25, because that is the I. C. C. joint-line scale rate for 118 miles.

Note:

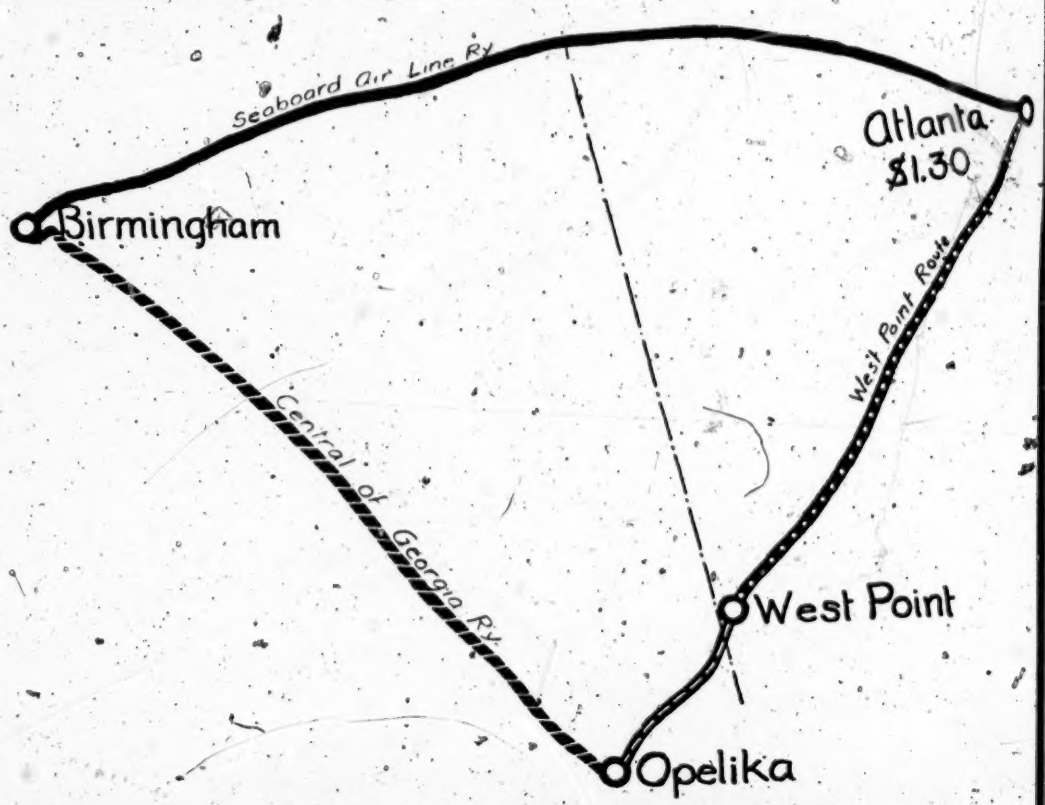
Carriers still maintain $1.10 from Chattanooga through Graysville to Hiram.

Under other orders of Commission, class rates and rates on brick, cement, fertilizer, sugar, etc., from Graysville are less than, or the same as, the rates from Chattanooga to Hiram.

C

Birmingham, Alabama—produces slag.

Atlanta, Georgia—an important destination.



FROM BIRMINGHAM TO ATLANTA.

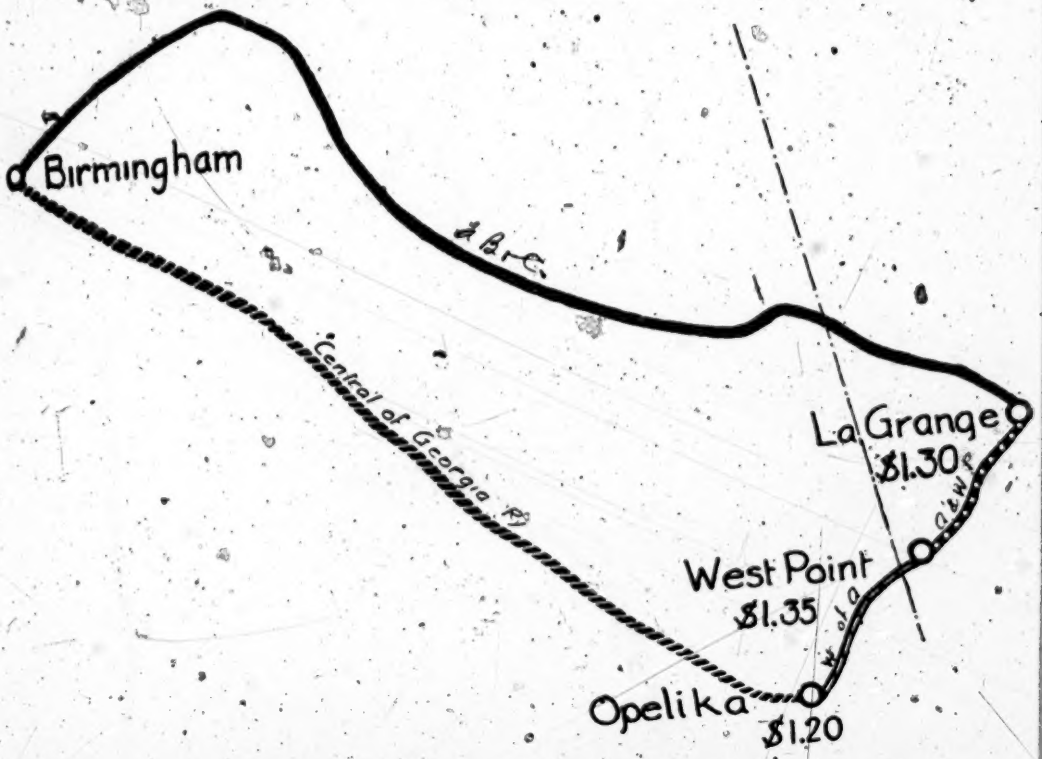
The Seaboard Air Line distance is 166 miles and the Commission's scale rate for that distance is $1.30.

The Central of Georgia is recognized as an important line from Birmingham via Opelika in connection with the Western of Alabama and Atlanta & West Point Railroads.

This route is 232 miles. The Commission's joint-line scale for this distance is $1.60. These carriers are charging $1.30 to Atlanta and $1.35 to West Point.

Birmingham, Alabama—produces slag.

LaGrange, Georgia—as an illustrative destination.



FROM BIRMINGHAM TO LA GRANGE.

The Atlanta, Birmingham & Coast Railroad is the **rate-making line,** 166 miles, (although not the shortest route), and charges $1.30, being the Commission's scale rate for that distance.

The Central of Georgia in connection with the Western of Alabama and Atlanta & West Point Railroads, is an important route from Birmingham via Opelika to LaGrange. The distance is 161 miles, (less than via the A., B & C), and the rate by this route is also $1.30. The Commission's so-called joint-line scale rate for 161 miles is $1.40.

Note:

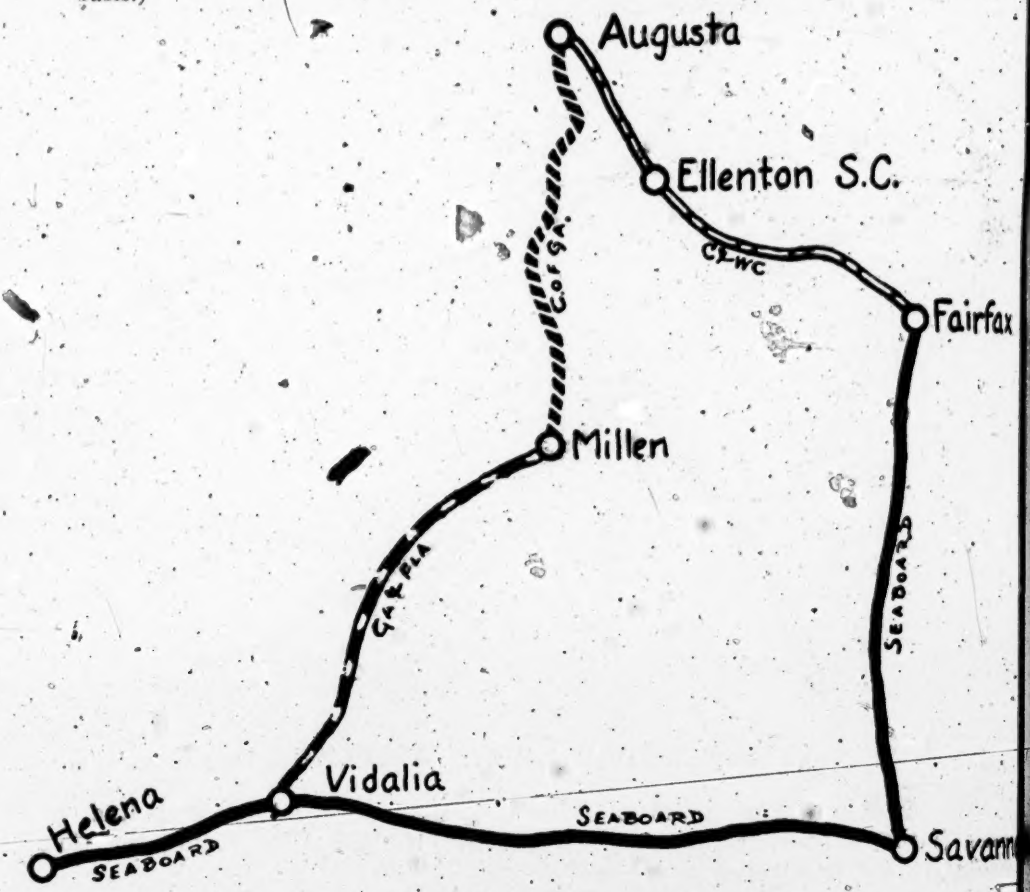
The Central of Georgia and Western of Alabama are charging $1.35 from Birmingham to West Point, intermediate to LaGrange.

Under other decisions of the Commission, the rates from Birmingham via Opelika to West Point, are the same as or less than the rates to LaGrange on cement, brick, fertilizer, sugar, etc., and this is true of the class rates.

Ellenton, South Carolina—produces gravel.

Helena, Georgia—a representative destination.

(The Georgia & Florida Railroad is named by the Commission as a short or weak line, taking the scale B basis, which is 25 cents per ton higher than the standard line basis.)



FROM ELLENTON TO HELENA.

The shortest route is via Charleston & Western Carolina Railroad to Augusta, Central of Georgia to Millen, Georgia & Florida (weak line) to Vidalia and Seaboard Air Line; distance 163 miles. The rate maintained over this route is $1.40. The Commission's maximum scale rate for this distance over such route is $1.65.

Over another route, of Charleston & Western Carolina, to Fairfax, Seaboard Air Line via Savannah and Vidalia, the through distance is 220 miles, for which the Commission's maximum rate is $1.50. These carriers are charging $1.40.

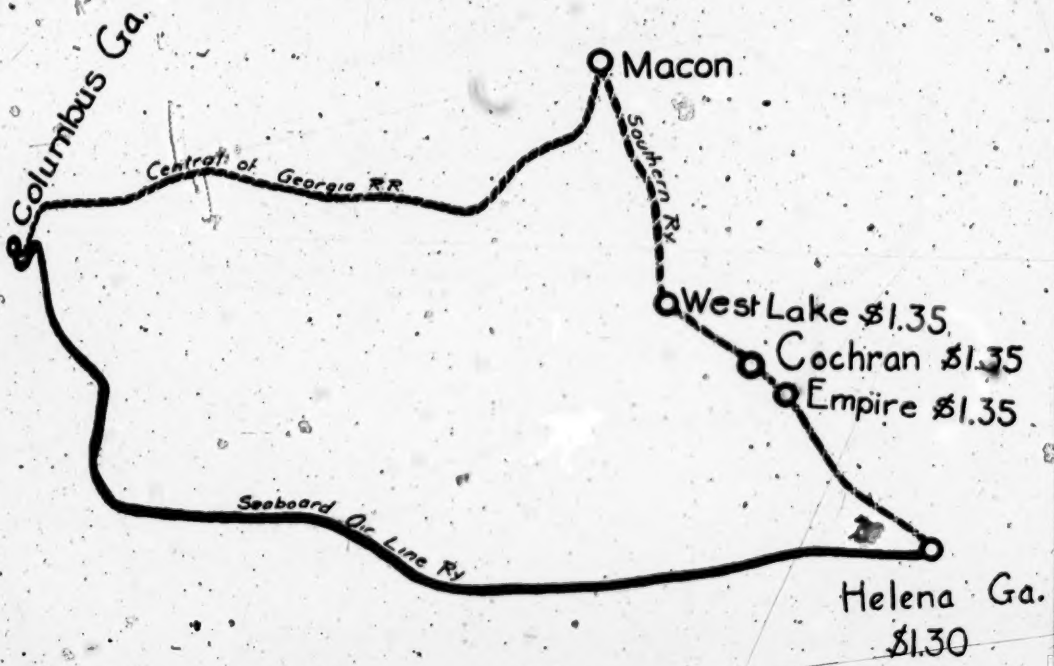
Note:

There is no competitive reason for the Georgia & Florida waiving the higher scale basis applicable under the Commission's order.

F

Columbus, Georgia—produces gravel and sand.

Helena, Georgia—a representative destination.



FROM COLUMBUS TO HELENA.

Seaboard Air Line intrastate route is 153 miles. The Georgia Commission order prescribed a maximum rate of $1.20, which the carriers have increased to $1.30, being the I. C. C. maximum scale rate for 153 miles.

Another intrastate route is composed of Central of Georgia to Macon, Southern Railway through West Lake, Cochran and Empire to Helena. The distance by this route is 176 miles. The Commission's joint-line scale for that distance is $1.45. But the carriers have raised the rate from Columbus to Helena only to $1.30 via this route, meeting the rate of the Seaboard Air Line.

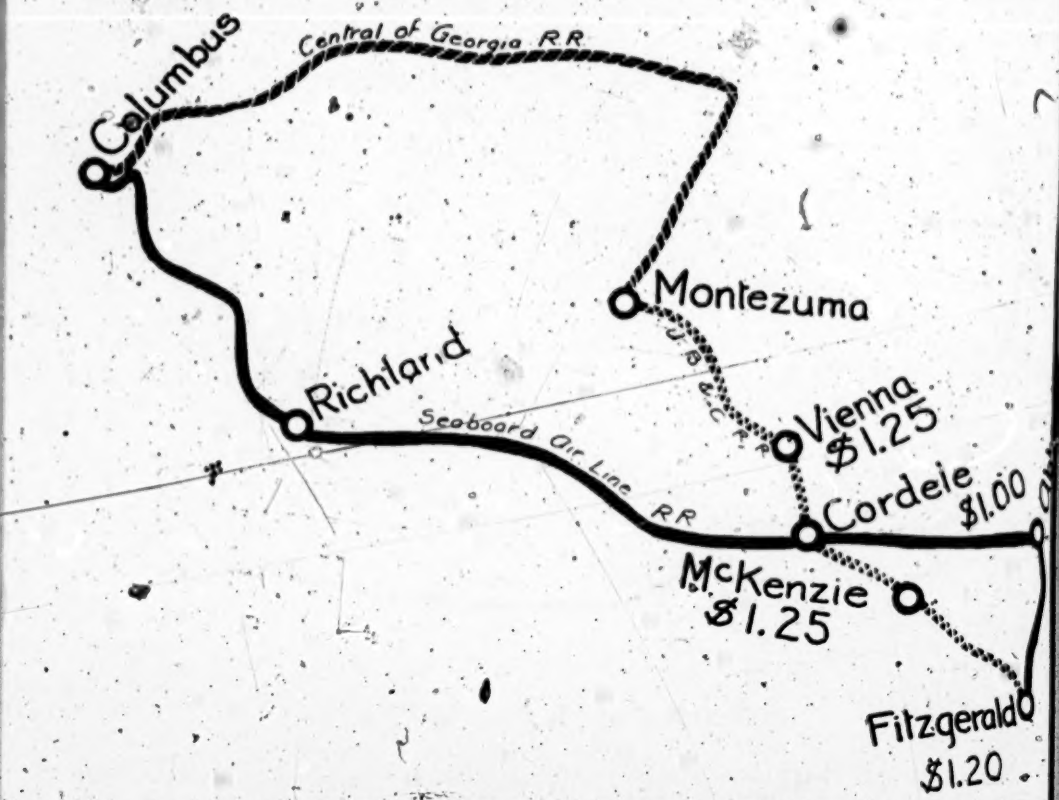
Note:

From Columbus to Empire, Cochran and West Lake, the Central of Georgia and Southern Railway have increased their rate, under cover of the Commission's order, from $1.00 and $1.20 to $1.35, being the Commission's joint-line scale for the distances by this route.

The Commission's order here creates long-and-short-haul violations.

Columbus, Georgia—produces gravel and sand.

Fitzgerald, McKenzie, Cordele and Vienna, Georgia—representative destinations.



FROM COLUMBUS TO FITZGERALD.

The Seaboard Air Line extends from Columbus through Cordele and Abbeville to Fitzgerald, 150 miles. The Georgia Commission's maximum rate for that distance was $1.20, and has not been changed under the I. C. C. order.

The Central of Georgia, in connection with the Atlanta, Birmingham & Coast, furnishes a route from Columbus, (through Vienna, Cordele and McKenzie) distance 132 miles to Fitzgerald, or shorter than via the Seaboard Air Line. The Commission's joint-line scale rate for this distance is $1.35, but these carriers have not raised their rates from Columbus to Fitzgerald or Cordele, maintaining the same rates, $1.20 and $1.00, as continued by the Seaboard Air Line.

FROM COLUMBUS TO McKENZIE AND VIENNA.

The Central of Georgia and the Atlanta, Birmingham & Coast have increased the rate from Columbus to Vienna and McKenzie, to $1.25, the full I. C. C. scale rates for these distances.

The Seaboard Air Line has also increased the rate from Columbus via Cordele to Vienna and McKenzie to $1.25.

The Commission order has here created long-and-short-haul violations

General Description of Interstate Tariff.

The interstate rates which were and are in effect, and from which the exhibits filed of record were made, were published in tariff issued by Agent J. H. Glenn as freight tariff No. 88-A, his I. C. C. No. A-655. This is in evidence before the court and is a thick tariff of which pages numbered 1 to 241 inclusive, is made up of tables of specific point to point rates, covering every originating station where these materials are actually produced to every destination of any importance in the southern states.

Besides these specific rates, which are named in cents per ton, without showing any reference to what the distances may be for which the rates apply, the tariff also contains on page 234 the Commission's interstate distance scales, with rules as to how those scales shall be applied. It states specifically at the top of page 234 that the scales govern only in the absence of specific rates on the preceding 241 pages of the tariff.

Item 55 at the top of page 58-A of this tariff, in effect provides that the rates in the tariff are subject only to the special routing instructions there shown. The substance of this restriction is that rates of certain amounts will not apply over routes which are longer than certain distances. In other words, and for illustration, the Commission's maximum scale rate for a joint line distance of 125 miles is 125 cents; and item 55 provides that a rate of 125 cents will not apply over a route of more than 212 miles between the point of origin and destination. There is no other routing restriction in the tariff, excepting some restrictions immaterial to our present statement which are found on pages 249 to 274 and which affect only the Atlantic Coast Line Railroad.

Publication of Rates, Chattanooga to Hiram.

In connection with the example shown on Chart B of this Appendix, p. xvii, of rates from Chattanooga to Hiram, Georgia, attention is directed to the following specific rates contained in the above tariff:

From Chattanooga to Hiram, Ga., 110 cents, page 203, line 70.

From Chattanooga to Cedartown, Ga., 100 cents, page 203, line 35.

Chattanooga to Rockmark, Ga., 110 cents, page 210, line 35.

Chattanooga to Ladds, Ga., 115 cents, page 143, line 97.

The foregoing rates apply over all of the routes shown on Chart B, including N. C. & St. L., to Cartersville, Seaboard Air Line to destination; and including Central of Georgia to Cedartown and Seaboard Air Line beyond. The distances and the above rates over these routes are as follows:

	From Chattanooga.		
To	Route	Miles	Rate
Hiram	Sou. Ry.	125	110
Hiram	N. C. & St. L.-S. A. L.	135	110
Hiram	C. of Ga.-S. A. L.	132	110
Cedartown	C. of Ga.	98	100
Rockmart	C. of Ga.-S. A. L.	111	110
Rockmart	N. C. & St. L.-S. A. L.	112	110
Rockmart	Sou. Ry.	103	110
Ladds	N. C. & St. L.-S. A. L.	93	115
Ladds	Sou. Ry.-S. A. L.	122	115

It will be observed that the rates from Chattanooga via Cartersville to Ladds, which is on the Seaboard Air Line

between Cartersville and Rockmart, violate the long and short haul prohibition in Section 4 of the Act, being higher than the rates to Rockmart, Cedartown, and Hiram, all of which apply through Ladds.

General Description of New Intrastate Tariff.

The new state rates in Georgia which are filed ostensibly in compliance with the Commission's decision, under review, are in supplement No. 8 to Agent J. H. Glenn's freight tariff No. 33-A, his I. C. C. number A-716, consisting of only four pages. This tariff and this supplement thereto are evidence before the court. In contrast with the interstate tariff, this supplement names no specific rates from point to point on sand and gravel, but simply names as the rates to govern traffic in Georgia the scales which the Interstate Commission prescribed as maximum for intersfate use in its original order and in its later order prescribed as maximum for state traffic. Consequently, this supplement names the maximum scale as the absolute rates. The manner in which this scale is applied within the state is different than the application given the interstate scale and is defined on page numbered 1 of the main tariff, I. C. C. No. A-716, to which supplement 8 is an addition:

Turning to page 1 of the main tariff the court will notice three things:

(a) There is no provision that the scale rates will be applied to the shortest mileages over which traffic can move without interchange of lading; and Mr. Price testified that such was not the rule in Georgia. (R. 775.)

(b) Item 10 provides in substance that when rates are established by one route between competitive points, the longer routes are authorized to meet that rate. This

is what the carriers refer to as similar to their interstate rule; but it is distinctly modified by the exception in item 15 on the same page.

(c) Item 15 provides routing instructions and states in substance that the rates between any two points apply via all available routes, *except as provided below.* Then comes the exception which is not found in the interstate tariff and which is very important, that rates between junction points, (which means competitive points) and local stations, (which means non-competitive points) will apply only via the railroad that serves the local point.

PUBLICATION OF RATES, GRAYSVILLE TO HIRAM.

The rates from Graysville, Georgia, via the N. C. & St. L. Railroad and Cartersville, to the same stations heretofore mentioned on Chart B, and which are now in effect, under Supplement 8 to I. C. C. A-716, are higher than the rates from Chattanooga, although for shorter distances of actual transportation, and are as follows:

	FROM GRAYSVILLE, GA.		
To	Route	Miles	Rate
Hiram	N. C. & St. L.-S. A. L.	118	125
Rockmart	N. C. & St. L.-S. A. L.	96	115
Ladds	N. C. & St. L.-S. A. L.	76	105
Cedartown	N. C. & St. L.-S. A. L.	109	125

It will be noticed that from Chattanooga through Graysville, the N. C. & St. L. is charging only 110 cents to Hiram and Rockmart, 115 cents to Ladds and 100 cents to Cedartown.

Before the Commission's order took effect, the carriers were charging under the Georgia Commission's order,

from Graysville, 110 cents to Hiram, and 100 cents to Rockmart and Cedartown.

If the Commission's order merely required the rate from Graysville to these points to be "no lower, distance considered" than the defendants, according as they participate in the transportation, contemporaneously maintained on interstate traffic, it hardly can be said to have required higher rates from Graysville than from Chattanooga, although the distances were less.

It will be noticed that the rates from Graysville all violate the long and short haul prohibition, as compared with the rates from Chattanooga.

It was said at the argument before the District Court that this is permitted by the fourth section order entered by the Commission. That is not true and would be beyond the power of the Commission, because of the so-called equi-distance limitation in Section 4 of the Act.

In substance Section 4 provides that when granting relief, in special cases, the Commission shall not grant relief to a circuitous line, on account of circuity, in respect of an intermediate point from which the distance is not greater than by the short line from the competitive point which produces the violation. In other words, from Graysville to Hiram, the distance over the N. C. & St. L. being only 118 miles, which is less than the short line distance via Southern Railway from Chattanooga to Hiram, it would be beyond the power of the Commission to grant relief from the long-and-short haul rule to the N. C. & St. L. Railroad from Graysville *vs.* Chattanooga on account of circuity from the latter point. The same thing is true of the fourth section violations from Chattanooga to Ladds *vs.* Rockmart and Cedartown.

Other State Rates to Hiram.

From Junction City, Georgia, to Hiram, distance 126 miles via A. B. & C.-Southern-Seaboard, the intrastate rate now published is 135 cents under supplement 8 to I. C. C. A-716, having been advanced from the Georgia maximum rate of 110 cents. Is this required by the interstate order, in the light of the fact that the Seaboard charges only 110 cents from Chattanooga to Hiram, a route of 135 miles?

From Gaillard, Georgia, to Hiram, 119 miles, via Southern-Seaboard, the rate has been increased from 110 to 125 cents. Was this required by the terms of the Commission's order, in the light of the fact that these roads are hauling from Chattanooga to Hiram, 135 miles, for 110 cents?

The Seaboard Air Line is hauling interstate materials from Birmingham to Hiram, 141 miles for 120 cents; (Exhibits 121-B and 123-B, page 3 line 1 of Freight Tariff I. C. C. No. A-865), and this rate also applies via Southern Railway, distance 159 miles. Yet from Graysville 118 miles, Gaillard 119 miles, Junction City 126 miles, the state rates have been forced up to 125 and 135 cents.